89-342

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

SUPREME COURT OF THE UNITED STATES

WILSON ROBERT SHERMAN, petitioner

v

NISSAN MOTOR CORPORATION IN U.S.A, and
NISSAN LIMITED

ON PETITION FOR CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA
FIRST APPELATE DISTRICT

WILSON ROBERT SHERMAN
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Encino, CA 91316
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Petitioner, In Pro Per

CASE NO.

SUPREME COURT OF THE UNITED STATES

WILSON ROBERT SHERMAN, petitioner

v

NISSAN MOTOR CORPORATION IN U.S.A, and
NISSAN LIMITED

PETITION FOR WRIT OF CERTIORARI

QUESTIONS FOR REVIEW

The underlying matter involves issues of product liability and product safety. Petitioner will make obvious the fact that Defendant, NISSAN has a lethal steering lock defect that poses a National Emergency. Petitioner contends that the trial judge's holding that the warning given in the owners manual was sufficient as a matter of law is in error and a further denial of due process. Petitioner raises questions of public safety and seeks review in order to prevent "unreasonable risks of injury as mandated by Congress in enacting the Consumer Product Safety Act (15 U.S.C. section 2051, et seq). Petitioner was denied a review on purely technical issues while the California Appellate Court and California Supreme Court turned it's back on the State's Constitutional provision which provides that pursuing

and obtaining safety is an inalienable right.

PARTIES

The within products liability action was brought by Petitioner, Plaintiff WILSON ROBERT SHERMAN against Respondent, Defendants NISSAN MOTOR COMPANY IN U.S.A. and NISSAN LIMITED. Additional parties to the rulings sought to be reviewed are the HONORABLE JOHN G. SCHWARTZ, JUDGE, of the SAN MATEO COUNTY SUPERIOR COURT, the COURT OF APPEAL OF THE STATE OF CALIFORNIA, First Appellate District, District Three and the SUPREME COURT OF THE STATE OF CALIFORNIA.

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JURISDICTION

The CALIFORNIA SUPREME COURT denied Petitioner's petition for review on April 25, 1989. Petitioner now has no plain, speedy and adequate remedy other than by this petition for certiorari. Rule 17 of the Rules of Court of the United State Supreme Court states that certiorari "will be granted only when there are special and important reasons therefor." Petitioner submits that highway deaths due to a defective design by Defendant NISSAN MOTORS is a "special and important reason." "'Special and important reasons' imply a reach to a problem beyond the academic or episodic (Rice v Sioux City Cemetery (1954) 3439 US 70, 74)."

The CALIFORNIA SUPREME COURT in denying Petitioner's petition for review in essence has affirmed the Superior Court ruling that a warning in a vehicle

owner's manual was sufficient as a matter of law. Said ruling is in conflict with state and federal holdings. The denial of review also allows to stand the trial court's restriction on the testimony of Petitioner's expert witness and further denies petitioner his right to due process granted under the fourteenth amendment to the Constitution.

UNDERLYING CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner calls to the Courts attention the following Constitutional provisions and statutes:

a. Fourteenth Amendment to the United States Constitution, Section 1, as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. Article one, Section 1 of the Constitution of the State of California as follows:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

c. 15 U.S.C.A. 1402(a) as follows:

> Every manufacturer of motor vehicles or tires shall furnish notification of any defect in any motor vehicle of motor vehicle equipment produced by such manufacturer which he determines, in good faith, relates to motor vehicle safety, to the purchaser (where known to the manufacturer) of such motor vehicle or motor vehicle equipment, within a reasonable time after such manufacturer has discovered such defect.

d. 15 U.S.C. section 2051 Congressional findings and declaration of

purpose

(a) the Congress finds that -

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;

(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;

(3) the public should be protected against unreasonable risks of injury associated with consumer products;

(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;

(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and

(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.

(b) The purposes of this chapter are -

(1) to protect the public against unreasonable risks of injury associated with consumer products;

(2) to assist consumers in

evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

STATEMENT OF CASE

On November 24, 1981, Petitioner, plaintiff WILSON SHERMAN and his fiance JULIE RIESS took a ride in SHERMAN's mother's new 1981 Datsun 280 ZX (manufactured by defendant NISSAN). The vehicle veered off the road and crashed into a tree, killing RIESS and injuring SHERMAN.

Subsequent examination of the vehicle and accident reconstruction revealed that steering wheel lockup as the cause of the crash. It is Petitioner's contention that the steering wheel lockup occurred as a result of a

design defect in the steering column of the NISSAN vehicle, in that an inadvertent lockup occurred while the vehicle was in motion.

All American auto utilize a safety device to prevent inadvertent steering lock-up. NISSAN ignored this crucial de facto safety device for nearly twenty years, making a remedial design change, starting only in 1987.

The NHTSA has reported in the Federal Register of April 5, 1988 that inadvertent lock-up continues to harm and kill.

The California Department of Motor Vehicles has recently issued a warning about inadvertent lock-up. They alerted the drivers in California about the extreme danger of inadvertent lock-up in their new drivers handbook.

Though required by the Traffic Motor Vehicle Safety Act to warn all

states/drivers of NISSAN vehicles, about this defect, NISSAN refuses to do so.

Petitioner filed a civil action on November 22, 1982. The matter came to trial on March 10, 1987 and culminated in a general verdict and judgment for Defendants which was entered on April 7, 1987.

During the trial, the trial judge precluded Petitioner's expert witness, SCHMIDT, from testifying as to the design defect as SCHMIDT had not finalized his opinion at the time of his deposition by Defendant. The trial judge further refused to allow jury instruction BAJI 9.00.7 relating to liability for failure to warn. Judge McDonald held that the existence of a warning in the owner's manual was sufficient as a matter of law.

Petitioner appealed the judgment on the grounds of prejudicial errors and that a matter of great public safety was

at issue. The Court of Appeal of the State of California In and For the First Appellate District, Division Three, denied the appeal on February 8, 1989 for failure to comply with California Rules of Court, rule 13 and 15(a). The California Supreme Court denied the petition for review on April 25, 1989. To date no review of the case on its merits has occurred. Although NISSAN altered its steering lock design in 1987 as a remedial action, there still exists per 1987 cars on the highway containing this serious steering lock defect. The United States Supreme Court, as the final Court of appeal, is Petitioner's last hope to bring this defect to the attention of the public in the hope of saving lives.

////

ARGUMENT

The California Supreme Court, by denying Petitioner's request for review allowed to stand a trial court ruling which is in conflict California Appellate rulings, federal holdings and the intent of Congress in enacting the Consumer Product Safety Act (as stated in 15 U.S.C section 2051). The trial judge based his ruling to exclude BAJI 9.00.7, liability for failure to warn, on Temple v Velcro USA, Inc (1983) 148 CA3d 1090. It is apparent by the Court of Appeals holding in Lunghi v Clark Equipment Co (1984) 153 CA3d 485, that such a ruling was not the intent of Temple, supra. The Court in Lunghi states, citing Temple and numerous other cases, that "In the instant case, however, reversal is required in spite of the 'no defect' finding because of the trial court's refusal to instruct the jury that failure to warn or an

inadequate warning may constitute a design defect [emphasis added] (Lunghi v Clark Equipment Co, supra, at 493-494)." In Nevels v Ford Motor Company (1971) 439 F2d 251, 258 the United States Court of Appeals upheld a jury instruction allowing the jury to determine whether a warning was required, "and if so whether Ford had complied by sending a proper notice [emphasis added]."

15 U.S.C.A. 1402(a), supra, requires that every manufacture of motor vehicles furnish notification of any defect. "The trial judge correctly interpreted the statue to mean that if Ford discovered in one car a defect common to automobiles manufactured by it, Ford then had a duty to notify other purchasers (Nevels v Ford Motor Co, supra, at 256)." The clear intent of the Congress and the Courts' holdings is not that such a warning should be relegated to page 25 of an

owner's manual. Petitioner's Constitutional right to due process of law has been denied by the trial courts refusal to give a proper jury instruction.

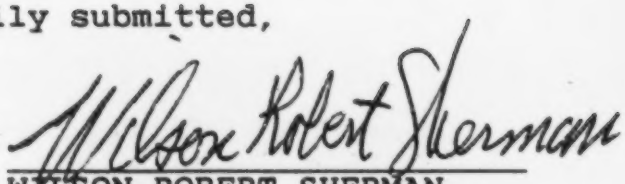
The questions raised by this petition go beyond the technical to a very simple issue, the protection of lives. The fourteenth amendment to the Constitution prohibits any state from depriving any person of life without due process. Yet the action of the trial court, the California Court of Appeals and the California Supreme Court have allowed NISSAN MOTORS' not to be held accountable for steering lock defect which potentially deprives persons of life without due process. Congress saw the need to protect the individual from "unreasonable risks of injury" and to prevent "protect-related deaths" when it enacted the Consumer Product Safety Act, 15 U.S.C. section 2051 et seq. The

California Constitution, article one, specifically grants to its citizens the unalienable right of "pursuing and obtaining safety". Petitioner SHERMAN submits that the United States Constitution, the California Constitution and the actions of Congress expressly dictate that a review of the trial proceedings and judgment in the underlying matter herein is in the public interest and well within the jurisdiction of this Court.

Wherefore, Petitioner prays that a writ of certiorari or other appropriate writ may be issued out of this Court to the San Mateo County Superior Court of the State of California commanding it to certify and return to this Court certain proceedings had before it as follows: SHERMAN v NISSAN MOTOR CORPORATION, Case number 269509; and for such other and further relief as the Court may deem

just.

Respectfully submitted,



WILSON ROBERT SHERMAN
Petitioner, In Pro Per

APPENDIX

A. Dismissal of Appeal by Court of Appeal of the State of California In and For the First Appellate District Division Three, filed February 8, 1989. See Exhibit "A".

B. Order Denying Review by the Supreme Court of the State of California, filed April 25, 1989. See Exhibit "B".

EXHIBIT "A"
COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

Wilson Sherman, Plaintiff and Appellant, vs. Nissan Motor Corporation, et al., Defendants and Respondents	1/A038665 San Mateo County Superior Court No. 269509

BY THE COURT:

On October 26, 1988, this court ordered appellant's opening brief stricken "for failure to comply with California Rules of Court, rule 13 and 15(a). (Berger v. Godden (1985) 163 Cal.App.3d 1113.)" The order further provided that appellant would be given 30 days in which to file a brief which complied with the rules and case law requirements, and that if he failed to do so, "that appeal will be dismissed."

On December 5, 1988, appellant filed an opening brief which again failed to comply in any significant

15(a)

spect with the rules of court and the case law
quirements.

Therefore, respondent's motion to dismiss the
peal is granted; the appeal is hereby dismissed.

Respondent's request for costs and attorney fees
denied. Respondent's motion to augment the record
d appellant's request for judicial notice are
enied as moot.

ated _____

_____ P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 3, No. A038665

S009371

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WILSON ROBERT SHERMAN

v.

NISSAN MOTOR CORPORATION et al.

SUPREME COURT
FILED
APR 25 1989
Robert Wandruff Clerk
Deputy

Appellant's petition for review DENIED.

Chief Justice

Supreme Court, U.S.
FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-342

In The

Supreme Court of the United States

October Term, 1989

WILSON ROBERT SHERMAN

Petitioner,

v.

NISSAN MOTOR CORPORATION IN U.S.A. and NISSAN MOTOR CO., LTD.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a state trial court renders judgment in favor of the defendant manufacturer and the defendant distributor after a unanimous jury verdict in a products liability action based solely upon state law; where plaintiff appeals the judgment and fails to supply an adequate record and brief to the State Court of Appeal despite specific admonishment from the Appellate Court; and where the plaintiff/appellant/petitioner presents no federal question to the state courts for decision,

1) Does the Court have jurisdiction to grant review in this instance?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND DECISIONS BELOW

The lengthy list of proceedings which have transpired since the entry of judgment on the unanimous jury verdict in this case are set out in Appendix B. Petitioner's appeal before the First District Court of Appeal for the State of California was dismissed for his repeated failure to comply with the California Rules of Court. That action of dismissal was taken only after lengthy proceedings had already occurred in the Court of Appeal and petitioner had been given substantial warning and opportunity to correct the deficiencies in his brief. After

dismissal of his appeal, the Supreme Court of the State of California denied his petition for review without opinion.

JURISDICTION

The Court is without jurisdiction to consider this Petition For Writ of Certiorari. Rule 17.1 of the Rules of the Supreme Court of the United States provides the initial framework which this Court utilizes to consider whether cases are appropriate for review. Rule 17.1 provides:

> "1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be,

> settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

This petition arises from a superior court judgment entered on a unanimous jury verdict following a trial of a personal injury claim based upon a state products liability theory against Nissan arising out of a motor vehicle accident which occurred in 1981. Even reading the extant Petition for Writ of Certiorari in the most favorable light fails to demonstrate any basis for jurisdiction with this Court. At no time did any state court consider a federal question in a way which conflicted with the decision of another state court of last resort or of a federal court of appeals nor did any state court in this matter decide an important question of federal law. Petitioner suggests that somehow he was deprived of his right to due process when the state appellate court dismissed his appeal for his failure to comply with the California Rules of Court. Petitioner makes this assertion despite having been previously admonished by the California Court of Appeal concerning the deficiencies in his brief and despite being given more than adequate opportunity and time to correct those deficiencies.

Even assuming for the sake of argument, that the Petition for Writ of Certiorari does in fact present a federal question, this Petition represents the first time it has been raised. Petitioner's failure to raise the federal question in the state courts deprives the state the opportunity to render a decision on that "issue" and produces the same conclusion, that this Court has no jurisdiction to consider the petition now before it.

Furthermore, irrespective of what happened in the trial court, and assuming that Petitioner could claim a federal issue had been raised and preserved in the trial court, the appellate court's action to dismiss Petitioner's appeal was based upon his complete failure to comply with California Rules of Court. The dismissal of the appeal, based upon procedural grounds serving a legitimate and significant state purpose constituted an adequate state ground for determination of the controversy.

Finally, Sherman's petition is deficient and fails to comply with the Supreme Court Rule 21.1(h). Petitioner did not specify the stage in the proceedings both in the court of first instance as well as the appellate court at which the federal questions sought to be reviewed were first raised, the method or manner in which they were raised and the way in which they were passed upon by that court.

STATEMENT OF THE CASE

This case arises out of a single vehicle accident which occurred on November 25, 1981. Plaintiff/Appellant/Petitioner, Wilson Robert Sherman ("Sherman"), who was 32 years of age, was operating his mother's 1981 Datsun 280ZX 2+2 eastbound on Newplace Road, in Hillsborough, California, coming downhill from the Burlingame Country Club. The vehicle was found shortly after midnight wrapped around a eucalyptus tree off on the left side of the two lane road.

Petitioner submitted his case to the jury on a theory that the vehicle left the roadway because the steering

column became locked. There were no witnesses to the accident. The Petitioner, who received only minor injuries, claimed to have no memory of the events immediately preceding the accident and for a period of several days after the accident.

Petitioner's entire case rested upon an analysis and reconstruction of the vehicle dynamics as well as vehicle components examined long after the accident. Petitioner built his case upon the opinion of one expert witness who came to his conclusion allegedly five years after the incident that the steering column locked at the time of the accident. It was submitted to the jury on a state law theory of design defect in that the key could be removed from the ignition while the car was in motion after the vehicle's engine had been turned off.

Cross-examination of Petitioner's expert witness established serious deficiencies in his reconstruction of the accident and the assumptions he made regarding the condition of the vehicle components at the time of the accident as opposed to the date they were inspected.

The defense put on evidence, including extensive expert testimony. The investigating police officers from Hillsborough and the California Highway Patrol investigating team (MAIT) found no evidence of vehicle defect or component malfunction. The only cause of the accident which they found was driver error due to excessive speed, both for the road and the conditions, and the driver's intoxication.

Mr. Sherman originally demanded and obtained an order from the court excluding evidence of his criminal conviction following this accident as a result of a motion

in limine before commencement of trial. However, while Mr. Sherman was on the stand and being examined by his own attorney, the evidence of his criminal prosecution was brought forth. On direct examination of one of his former lawyers, his attorney brought out the evidence of his criminal conviction and the sentence which he received following a plea of nolo contendre. Mr. Sherman was originally charged with drunk driving and manslaughter. He negotiated the plea and pled nolo contendre to a misdemeanor reckless driving resulting in bodily injury (California Vehicle Code § 23104). He was given a two year supervised probation and four months in jail, which was suspended. As part of the probation, Mr. Sherman was required to attend an alcohol/drug rehabilitation program as well as abstain from the use of alcohol and submit to alcohol testing.

The testimony from the defense reconstructionist, Ronald Woolley, Ph.D., was that the vehicle dynamics could only be explained if the automobile could have been steered at the time of the accident. In addition, there was testimony from a metallurgist who examined the components removed from the vehicle by appellant's agents, that those steering components established that the steering column was not locked at the time of impact.

The speed of the vehicle on the twisting downhill road, coupled with the state of intoxication of the petitioner were clearly sufficient to explain the loss of control of the vehicle and the resulting accident. The defense presented additional evidence on the subject of the design of the vehicle's ignition system. Expert testimony established that the design was not defective but in fact provided an excellent balance between the competing

interests of preventing automobile theft by encouraging people not to leave their keys in their automobiles and the prevention of inadvertent activation of the locking mechanism during normal operation of the vehicle.

Most significant is the fact that the jury returned after approximately five hours of total deliberation following a four week trial with a 12-0 defense verdict. No motion for new trial was filed nor was any attempt even made to tax costs.

Thereafter, a lengthy appeal process commenced which ultimately resulted in the dismissal of plaintiff's appeal for failing to comply with procedural rules in the Court of Appeal in the State of California. The petition for hearing before the California Supreme Court was denied and Petitioner then commenced this action before this court.

SUMMARY OF THE ARGUMENT

This court is without jurisdiction to consider Sherman's Petition For Writ of Certiorari, since no federal question was ever presented, preserved or decided by a lower court in this matter. The state appellate court's dismissal of Sherman's appeal was based solely upon a legitimate procedural ground in that Sherman failed to follow the California Rules of Court in filing of his brief on appeal. Finally, the instant petition reveals no evidence of a federal issue having been decided by a lower court and is itself not in compliance with the Rules of the Supreme Court of the United States.

ARGUMENT

A. The Petition For Writ of Certiorari Does Not Present An Issue Which Confers Jurisdiction Upon This Court.

Rule 17.1 of the Rules of the Supreme Court of the United States provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Petitioner Sherman asserts that his petition presents special and important reasons for review. However, this assertion does not withstand scrutiny. Petitioner has not shown that this case involves anything other than the determination of a basic products liability personal injury claim by a state trial court, and the subsequent ineffective appeal of that state trial court judgment. Not one of the three categories of "reasons for review," set forth in Rule 17.1(a), (b) and (c) is implicated herein.

Petitioner Sherman apparently asserts that somehow the California Court of Appeal's dismissal of his appeal for failure to comply with the applicable Rules of Court prescribing the content and format of his opening "brief" violated his due process rights under the Fourteenth Amendment to the United States Constitution.[1]

---

[1] Petitioner's statement of questions presented in his Petition For Writ of Certiorari herein, is completely unintelligible and respondents assert that Petitioner has failed to properly pose any question for consideration by this Court. However, if Petitioner's papers can be deciphered to state any "question" for review, this seems to be the "meat" of his claims.

Although Respondents could spend a great deal of time, addressing this meritless "constitutional" claim, it is wholly unnecessary in the present case. Assuming arguendo, that Petitioner has properly asserted a federal question, this Court is without jurisdiction to review that question, since Petitioner failed to ever raise the issue before the state courts. Neither Petitioner's opening brief before the First District Court of Appeal of the State of California nor his Petition for Review before the California Supreme Court raised any federal question.[2]

In *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162-1163 (1969) this Court held that "the Judiciary Act of 1789, C.20, § 25, 1 Stat. 85 vested [it] with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' (citations)." There petitioner sought to raise the constitutionality of a Louisiana statute for the first time in his petition for writ of certiorari. In further support of its decision to refuse consideration of the constitutional issue, this Court stated:

> "Questions not reviewed below are those on which the record is very likely to be inadequate, since it was certainly not compiled with those questions in mind."

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[2] Respondents have attached hereto and incorporated herein by reference, Appellant's Opening Brief and Petition For Review as Appendices K and M respectively.

The record herein is totally devoid of any discussion, reference, or implication of a substantial federal question.[3]

In *Webb v. Webb* 451 U.S. 493, 101 S.Ct. 1889, 1891 (1981) the petitioner sought to challenge a decree in divorce proceedings under the Full Faith and Credit Clause of the Federal Constitution. In holding that petitioner had not properly asserted the constitutional challenge in state court, this Court in its discussion of Rule 21.1(h), said,

> "This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggreviated party in this Court can show the contrary.' (citations omitted)."

As shown above, Petitioner has failed to show proper presentation in the state courts, and therefore his petition for writ of certiorari must be denied for lack of jurisdiction.

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[3] The glaring deficiency of anything on the record which could support an assertion that federal questions were raised in the state courts below, is further illuminated by Petitioner's failure to comply with Rule 21.1(h) of the Rules of the Supreme Court of the United States. Rule 21.1(h) requires that a petitioner's statement of the case shall "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." Rule 21.1(h), Rules of the Supreme Court of the United States.

Nor may Petitioner be properly heard to complain that the state courts dismissed his appeal upon procedural grounds. In *Michigan v. Tyler* 436 U.S. 499, 512 note 7, 98 S.Ct. 1942, 1951 (1978) this Court held that

> "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."

In the extant case, Petitioner's appeal before the First District Court of Appeal of the State of California was dismissed after Petitioner failed to comply with the California Rules of Court.[4] The dismissal for failure to

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[4] Petitioner failed to comply with Rule 13 and 15a of the California Rules of Court. Rule 13 provides:

> "Every Appellant shall file an opening brief, except that an appellant may join in a brief or adopt by reference any brief in the same or companion cases. The opening brief shall contain a statement of the case, setting forth concisely, but as fully as necessary for a proper consideration of the case, in such order as the appellant may prefer, the nature of the action or proceeding and the relief sought, a summary of the material facts, and the judgment or ruling of the superior court. The statement shall be accurate and confined to matters in the record on appeal." Rule 13, California Rules of Court.

Rule 15(a) states in relevant part:

> "[Headings, references, index and tables] Each point in a brief shall appear separately under an appropriate heading with subheadings if desired. Such headings need not be technical 'assignments of error' but

(Continued on following page)

comply with Rules 13 and 15(a), was not capricious nor did it deny Petitioner his right to due process. Much as the rule set forth in *Cardinale v. Louisiana*, supra, insures that the Supreme Court has a full and adequate record upon which to address federal questions, Rules 13 and 15(a) of the California Rules of Court insures that California's Appellate Courts have before them full and adequate records so that justice is done. And, just as Petitioner failed to provide an appropriate record for appeal in state court, so has he failed to provide the proper record for review in this Court. Thus, as his appeal was dismissed by the First District, so must his petition be denied for want of jurisdiction in the present setting.

(Continued from previous page)

should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record. Every brief shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions and other authorities." Rule 15(a), California Rules of Court.

CONCLUSION

Wilson Robert Sherman's Petition For Writ of Certiorari should be denied and damages under Rule 49.2 should be assessed against Sherman and in favor of Nissan. The frivolous nature of this Petition for Writ of Certiorari is clear on its face.

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October 9, 1989.

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APPENDIX A

Rule 28.1 Disclosure

Nissan Motor Company Ltd. is not the subsidiary of a publicly owned corporation. Nissan Motor Corporation In U.S.A. is a wholly owned subsidiary of Nissan Motor Company Ltd. Nissan Motor Corporation In U.S.A. and Nissan Motor Company Ltd. have various wholly owned subsidiaries and a few partially owned affiliates which are doing business within the United States. However, these partially owned affiliates are closely held and not publicly traded except for the following:

Nissan Motor Acceptance Corporation (U.S.A.)

APPENDIX B

Procedural Chronology

Date	Event
April 7, 1987	Judgment entered in favor of Defendants Nissan Motor Corporation In U.S.A. and Nissan Motor Company Ltd. following 12-0 jury verdict.
May 18, 1987	Plaintiff Wilson Robert Sherman files his Notice of Appeal with California Court of Appeal, 1st District.
November 18, 1987	Defendants/Appellees file their Motion To Dismiss Frivolous Appeal.
December 18, 1987	Plaintiff/Appellant files his opposition to Motion To Dismiss Frivolous Appeal.
December 31, 1987	Court of Appeal denies Motion To Dismiss Without Prejudice to motion being renewed at the time of hearing on the merits.
May 4, 1988	Plaintiff/Appellant files his opening brief with the Court of Appeal.
June 3, 1988	Defendants/Appellees renew Motion To Dismiss Frivolous Appeal.

Date	Event
June 17, 1988	Plaintiff/Appellants attorney files opposition to imposition of sanctions and admits appeal is unmeritorious.
June 20, 1988	Plaintiff/Appellant substitutes in pro per.
July 1, 1988	Plaintiff/Appellant files Opposition To Motion To Dismiss.
July 5, 1988	Defendants/Appellees file brief in reply to plaintiffs opposition.
October 26, 1988	Court of Appeal denies the motion to dismiss without prejudice and orders plaintiff/appellants brief stricken for failure to comply with the California Rules of Court. Plaintiff/Appellant is given thirty (30) days to file a new brief in compliance with the court's rules.
December 5, 1988	Plaintiff/Appellant files "new" opening brief with Court of Appeal.
December 6, 1988	Defendants/Appellees object to "new" brief on the grounds it fails to comply with the applicable California Rules of Court.
February 8, 1989	Court of Appeal dismisses plaintiff/appellant's appeal for failure to comply with the California Rules of Court.

Date	Event
March 13, 1989	Plaintiff files his Petition For Review with the California Supreme Court.
April 25, 1989	Plaintiff's petition for review is denied by the California Supreme Court.
July 21, 1989	Plaintiff/Appellant/Petitioner attempts to file Petition for Writ of Certiorari with the United States Supreme Court.
July 27, 1989	Petition returned by United States Supreme Court Clerk because exhibits not properly reproduced and the Superior Court judgment was not attached to the petition.
August 9, 1989	Petitioner attempts for the second time to file petition with United States Supreme Court. The Petition is not accepted.
September 5, 1989	Petitioner refiles petition for writ of certiorari [no judgment from the Superior Court is included].

APPENDIX C

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Attorneys for Defendant
NISSAN MOTOR CORPORATION
IN U.S.A. and
NISSAN MOTOR COMPANY, LTD.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE
COUNTY OF SAN MATEO

PATRICIA WILSON HANNA, AND WILSON ROBERT SHERMAN, Plaintiffs, v. NISSAN MOTOR CORPORATION IN U.S.A., Defendants,	San Mateo Superior Court No. 269509 CERTIFICATE OF THE CLERK OF THE SUPERIOR COURT

I, BARBARA FERREIRA, County Clerk and Clerk of the Superior Court of California for the County of San Mateo, certify that:

1. A Second Amended Complaint for strict liability, breach of warranty and negligence was filed by Defendant WILSON ROBERT SHERMAN on July 9, 1985, for alleged defective design of the product, damages according to proof at trial.

2. Daniel U. Smith, Post Office Box 278, Kentfield, California 94914 is the attorney of record for Plaintiff, Donald D. Howard and Vincent Galvin, McCutchen, Doyle, Brown & Enersen, 55 S. Market St., Suite 1500, San Jose, CA., 95113 are the attorneys of record for Defendants.

3. On April 7, 1987, IN the Superior Court of California for the County of San Mateo, Honorable John G. Schwartz, Presiding Judge, judgment by jury verdict was entered in favor of Defendants and against Plaintiff. Defendants were awarded costs in the amount of $136,784.27. Notice of entry of judgment was filed on April 14, 1987, and served by mail on counsel of record for all parties on April 14, 1987.

4. No Notice of Motion for New Trial was filed by Plaintiff. Defendants Cost Bill was not axed by Plaintiff.

5. On May 18, 1987, Plaintiff filed a notice of appeal in the First District Court of Appeal from the judgment of the Superior Court.

6. On May 18, 1987, Plaintiff filed Designation of Reporter's and Clerk's Transcript. Appellant elects to prepare a joint appendix purusant to Rule 5.1 in lieu of a clerks Transcript.

7. The record on appeal has not yet been completed or certified.

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the Superior Court of California for the County of San Mateo on Oct 23, 1987.

County Clerk and the Clerk of the
Superior Court of California for
the County of San Mateo

By: /s/ Barbara Ferreira
Barbara Ferreira
Deputy Clerk

Seal

APPENDIX D

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Attorneys for Defendants and Respondents
NISSAN MOTOR CORPORATION IN U.S.A.
and NISSAN MOTOR COMPANY, LTD.

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

PATRICIA WILSON HANNA and WILSON ROBERT SHERMAN, Appellants, v. NISSAN MOTOR CORPORATION IN U.S.A., and NISSAN MOTOR COMPANY, LTD., Respondents.	No. San Mateo Superior Court Case No.: 269509 NOTICE OF MOTION AND MOTION BY DEFENDANTS AND RESPONDENTS NISSAN MOTOR CORPORATION IN U.S.A. AND NISSAN MOTOR COMPANY, LTD., TO DISMISS FRIVOLOUS APPEAL (Filed Nov. 19, 1987)

TO APPELLANT AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that at the above-entitled Court, located at 455 Golden Gate Avenue, San Francisco, California, at a time which shall be set by the Court

pursuant to California Rule of Court, Rule 41(b), defendants and respondents, Nissan Motor Corporation In U.S.A. and Nissan Motor Company, Ltd., will move the Court for an order dismissing this appeal.

This Motion is made on the grounds that this appeal has no merit, is frivolous and that it has been filed as tactic, the sole purpose of which is to vex, annoy, and harass respondents.

The Motion is based on California Rule of Court, Rule 41, this Notice, the Memorandum of Points and Authorities attached hereto and incorporated herein by reference, the Certificate Of The Clerk Of The Superior Court attached to the Memorandum as Exhibit "B", and such other and further evidence as may be presented at the hearing.

Dated: November 13, 1987.

McCUTCHEN, DOYLE, BROWN & ENERSEN
Donald D. Howard
Vincent Galvin

By /s/ Vincent Galvin
For Donald D. Howard
Attorneys for Respondents
Nissan Motor Corporation In U.S.A. and Nissan Motor Company, Ltd.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, not a party to this action and employed in San Jose,

California at Market/Post Tower, Suite 1500, 55 South Market Street, San Jose, California 95113.

Today I caused to be served the attached NOTICE OF MOTION AND MOTION BY DEFENDANTS NISSAN MOTOR CORPORATION IN U.S.A. AND NISSAN MOTOR COMPANY, LTD., TO DISMISS FRIVOLOUS APPEAL by causing a true and correct copy of it to be placed in the United States Mail at San Jose, California in a sealed envelope with postage prepaid, addressed as follows:

Brian G. Thorne, Esq.
Law Offices of Robert C. Swanson
14724 Ventura Boulevard, Suite 1200
Sherman Oaks, California 91403

Clerk
Superior Court
County of San Mateo
Hall of Justice and Records
401 Marshall Street
Redwood City, California 94063

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Jose, California, on November 16, 1987.

/s/ Donna Eastman
Donna Eastman

McCUTCHEN, DOYLE, BROWN & ENERSEN
Donald D. Howard

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Attorneys for Defendants and Respondents
NISSAN MOTOR CORPORATION IN U.S.A.
and NISSAN MOTOR COMPANY, LTD.

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

WILSON kOBERT SHERMAN, Appellant, vs. NISSAN MOTOR CORPORATION IN U.S.A., and NISSAN MOTOR COMPANY, LTD., Respondents.	No. ___ San Mateo Superior Court Case No.: 269509 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS AND RESPONDENTS NISSAN MOTOR CORPORATION IN U.S.A. AND NISSAN MOTOR COMPANY, LTD.'S MOTION TO DISMISS FRIVOLOUS APPEAL (Filed November 16, 1987)

I

INTRODUCTION

This matter arises from the trial of a products liability case commenced by appellant, Wilson Robert Sherman,

following a four week trial and a 12-0 defense verdict. Mr. Sherman brought his action against defendants, Nissan Motor Corporation In U.S.A. and Nissan Motor Company, Ltd., following an automobile accident which occurred on November 25, 1981, while he was driving his mother's 1981 280ZX 2+2 automobile. Since the date of this accident in which his girlfriend was killed, Mr. Sherman has simply refused to believe that he was responsible for the accident.

Soon after the accident occurred, Mr. Sherman commenced a campaign against the respondents, as well as others, contending that defects in the vehicle he was operating actually caused the accident. Many of these letters, which were incomprehensible, were sent to Nissan and various other entities and individuals throughout the country and foreign lands.

Mr. Sherman originally filed this lawsuit in November of 1982. He has been represented by six different attorneys and at times he has appeared in pro per. By Substitution of Attorney filed on November 13, 1987, Mr. Sherman has now retained his seventh attorney.

To date, the respondents have been required to spend substantial sums of money to defend this action which they contend, and which the 12-0 defense verdict confirmed, is a frivolous case and nothing more than a vendetta by an irresponsible individual. This case and certainly this appeal has no merit and should be dismissed as frivolous. By the appellant's own admissions, this appeal is motivated not on the basis of any legal reasoning, but rather upon a belief that he is entitled to absolution for his own conduct.

II

FACTUAL BACKGROUND

This case arises out of a single vehicle accident which occurred on November 25, 1981. Appellant, Wilson Robert Sherman, who was 32 years of age, was operating his mother's 1981 Datsun 280ZX 2+2 eastbound on Newplace Road, in Hillsborough, California, coming downhill from the Burlingame Country Club. The vehicle was found shortly after midnight wrapped around a eucalyptus tree off on the left side of the two lane road.

Appellant submitted his case to the jury on a theory that the vehicle left the roadway because the steering column became locked. There were no witnesses to the accident. The appellant, who received only minor injuries, claimed to have no memory of the events immediately preceding the accident and for a period of several days after the accident.

Appellant's entire case rested upon an analysis and reconstruction of the vehicle dynamics as well as vehicle components examined long after the accident. Appellant built his case upon the opinion of one expert witness who came to his conclusion allegedly five years after the incident that the steering column locked at the time of the accident. It was submitted to the jury on a theory of design defect in that the key could be removed from the ignition while the car was in motion after the vehicle's engine had been turned off.

Cross-examination of appellant's expert witness established serious deficiencies in his reconstruction of the accident and the assumptions he made regarding the

condition of the vehicle components at the time of the accident as opposed to the date they were inspected.

The defense put on extensive evidence, including expert testimony. The investigating police officers from Hillsborough and the California Highway Patrol investigating team (MAIT) found no evidence of vehicle defect or component malfunction. The only cause of the accident which they found was driver error due to excessive speed, both for the road and the conditions, and the driver's intoxication.

Mr. Sherman originally demanded and obtained an order from the court excluding evidence of his criminal conviction following this accident as a result of a motion in limine before commencement of trial. However, while Mr. Sherman was on the stand and being examined by his own attorney, the evidence of his criminal prosecution was brought forth. On direct examination of one of his former lawyers, his attorney brought out the evidence of his criminal conviction and the sentence which he received following a plea of nolo contendre. Mr. Sherman was originally charged with drunk driving and manslaughter. He negotiated the plea and pled nolo contendre to a misdemeanor reckless driving resulting in bodily injury (California Vehicle Code § 23104). He was given a two year supervised probation and four months in jail, which was suspended. As part of the probation, Mr. Sherman was required to attend an alcohol/drug rehabilitation program as well as abstain from the use of alcohol and submit to alcohol testing.

The testimony from the defense reconstructionist, Ronald Woolley, Ph.D., was that the vehicle dynamics

could only be explained if the automobile could have been steered at the time of the accident. In addition, there was testimony from a metallurgist who examined the components removed from the vehicle by appellant's agents, that those steering components established that the steering column was not locked at the time of impact.

The speed of the vehicle on the twisting downhill road, coupled with the state of intoxication of the appellant, were clearly sufficient to explain the loss of control of the vehicle and the resulting accident. The defense presented additional evidence on the subject of the design of the vehicle's ignition system. Expert testimony established that the design was not defective but in fact provided an excellent balance between the competing interests of preventing automobile theft by encouraging people not to leave their keys in their automobiles and the prevention of inadvertent activation of the locking mechanism during normal operation of the vehicle.

The attached Exhibit "A" shows the schedule of events during the course of this trial. Most significant is the fact that the jury returned after approximately five hours of total deliberation with a 12-0 defense verdict. No motion for new trial was filed nor was any attempt even made to tax costs.

III

WILSON SHERMAN'S APPEAL IS FRIVOLOUS AND SHOULD BE DISMISSED

This motion is filed under the provisions of California Rule of Court 41. The required Certificate of the Clerk and Clerk's certification is attached as Exhibit "B".

The Appellate Court has the inherent power to dismiss frivolous appeals which have been brought to vex or harass the opposing party. *Ferguson v. Keays*, 4 C.3d 649, 658 (1971); *Estate of D'Avila*, 217 Cal.App.2d 123 (1963)

There are no specific tests for classifying such situations. However, in *McFadden v. Dietz*, 15 Cal. 697 (1897), the court held that dismissal was proper wherein the frivolous character of the appeal is apparent upon a "mere inspection" without an extended examination of the record. In that case, appellant admitted that the appeal was taken as a delay tactic.

In the more recent case of *Clark v. Universal Underwriters Insurance Company*, 233 Cal.App.2d 746 (1965), the court concluded that the appeal was frivolous by inference. In that case, the appellant appealed a trial court order which it knew was correct because it was based on undeniable California law and also because the same appellant litigated, and lost, the same issue previously. Therefore, the court saw no reason to proceed with the appeal and dismissed it on the grounds that it was frivolous and an obvious delay tactic.

Respondents in this matter concede that the Appellate Court generally prefers a full record on appeal prior to dismissing an action. However, in view of the fact that after trial, defendant received a unanimous verdict and the further fact that plaintiff has continuously admitted that this is a personal vendetta against respondents, it is clear that the appeal itself is nothing more than an extension of this personal vendetta and is, therefore, frivolous and should be dismissed.

Mr. Sherman has generated an inordinate amount of incomprehensible letters and, to use his words, "proclamations" which he has sent to various governments, individuals and the media in which he has made outrageous defamatory statements concerning respondents. Some of those documents are attached hereto and incorporated by reference as Exhibit "C". It should be noted that during the course of this litigation the defendants were forced to seek a protective order, including an order for sanctions against Mr. Sherman for harassing and vexacious telephone calls he made to the respondents.

Reviewing these various documents, it is obvious that Mr. Sherman is attempting to find personal absolution. Mr. Sherman is not seeking redress of a civil wrong. He simply has no regard for the law.

An appeal from a judgment entered upon a jury verdict cannot be based upon a claim that the jury should have weighed the evidence differently and should have come to a different result. A jury verdict may be reversed only if there is no evidence to support it. *Alderson v. Alderson,* 180 Cal.App.3d 450, (1986).

The jury was properly instructed on the legal issues. The attached Exhibit "D" are the jury instructions given.

The actual motivation and purpose of Mr. Sherman's appeal of the 12-0 defense verdict in this case has been set forth by Mr. Sherman in Exhibit "E" attached hereto. As the court will note, Exhibit "E" is a letter written to the Honorable Harland Veal in which Mr. Sherman has now admitted that the appeal pending before this court is motivated by subjective, irrational, and personal feelings. In the letter, Mr. Sherman states:

> "Lastly, you might have heard that the San Mateo Court reached a defense verdict for Nissan in that action. For the record, let it be known, that in light that Nissan is in violation of state and federal laws and in consequence is harming and killing Americans. I have no intention of resting my case, quite the contrary, I will be appealing both in court and the media, as well as seeking numerous investigations . . . " (Exhibit "E", letter to The Honorable Harland Veal from Wilson Robert Sherman, dated May 5, 1987.)

A review of all of the various documents and Exhibits attached hereto and read together, place the context of Mr. Sherman's letter to Judge Veal and establish that there is absolutely no proper letal motivation for the appeal of this case. It is on the basis of this admission of the appellant that we seek to have this matter dismissed.

IV

CONCLUSION

Respondents have not spent substantial sums of money for fees and costs to defend this case. From the date of the accident up to the present time, Mr. Sherman has established that his only motivation for bringing the case was to seek personal absolution and somehow absolve himself of his personal responsiblity for the death of his passenger. The courts are not now and never have been established for that purpose. Consequently, in order to terminate the expenditure of additional fees and expenses to further defend this frivolous action, it is respectfully requested that the case be dismissed forthwith.

Dated: November 13, 1987.

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN & ENERSEN
Donald D. Howard
Vincent Galvin

By /s/ Vincent Galvin
For Donald D. Howard
Attorneys for Respondents
Nissan Motor Corporation In U.S.A. and Nissan Motor Company, Ltd.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, not a party to this action and employed in San Jose, California at Market/Post Tower, Suite 1500, 55 South Market Street, San Jose, California 95113.

Today I caused to be served the attached MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS NISSAN MOTOR CORPORATION IN U.S.A. AND NISSAN MOTOR COMPANY, LTD.'S MOTION TO DISMISS FRIVOLOUS APPEAL by causing a true and correct copy of it to be placed in the United States Mail at San Jose, California in sealed envelopes with postage prepaid, addressed as follows:

Brian G. Thorne, Esq.
Law Offices of Robert C. Swanson
14724 Ventura Boulevard, Suite 1200
Sherman Oaks, California 91403

Clerk
Superior Court County of San Mateo
Hall of Justice & Records
401 Marshall Street
Redwood City, California 94063

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Jose, California, on November 16, 1987.

/s/ Donna Eastman
Donna Eastman

APPENDIX E

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COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

WILSON ROBERT SHERMAN, Appellants, v. NISSAN MOTOR CORPORATION IN U.S.A., and NISSAN MOTOR COMPANY, LTD., Respondents.	No. A038665 San Mateo Superior Court Case No.: 269509 *EXTENSION REQUESTED* (Filed June 3, 1988)

NISSAN'S MEMORANDUM OF POINTS AND AUTORITIES IN SUPPORT OF THEIR MOTION TO DISMISS A FRIVOLOUS APPEAL AND FOR FEES AND COSTS AND REQUEST FOR AN EXTENSION TO FILE THE RESPONSE BRIEF AND JOINT APPENDIX

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I. *INTRODUCTION*

This is an appeal over nothing. Appellant contends the court erred when it precluded his expert from testifying to opinions he did not have at his deposition six days before the trial. Appellant's counsel ignores the many lengthy hearings the court held on the subject and, for obvious reasons, the fact that he admitted the opinions were not supported by the evidence. And now, after all that, appellant thinks the evidence should have been admitted! This is preposterous and a colossal waste of time and money for all concerned.

Nissan contends this appeal has no merit and requests the court reconsider Nissans' motion to dismiss filed on November 16, 1987 along with this memorandum and the present record. This memorandum will outline the facts and general procedural history of this case; show appellant's brief and the limited record he relies on is inadequate to support his contentions thereby requiring dismissal; and establish that regardless of the brief's deficiencies, the case should be dismissed anyway. Finally, Nissan will renew its request for costs and fees.[1]

---

[1] Appellants brief does not contain a complete statement of the facts or review the entire cause as required by the California Constitution. Therefore, if the Court permits the appeal to continue Nissan requests a 60 day extension of time in which to prepare and file its responsive brief. This extension is justified since Nissan will have to do substantially more work than would be necessary had appellants complied with the applicable rules and provided a complete statement of the case and factual background. Furthermore, appellant's counsel

(Continued on following page)

II. *FACTUAL AND PROCEDURAL BACKGROUND*

A. *The Accident*

On November 25, 1981 at approximately 12:00 a.m. appellant, Wilson Robert Sherman, was driving his mother's 1981 Nissan 280ZX 2+2. He lost control of the vehicle, went across the road, and hit a eucalyptus tree in the area of the "A" pillar on the passenger's side. Julie Reiss, his passenger, was fatally injured (R.T. 593, 594).

B. *Litigation*

(1) *Criminal Proceeding*

Mr. Sherman admitted to drinking alcohol prior to the accident. Tests performed at 1:20 a.m. at Peninsula Hospital showed his blood alcohol was between .11 and .09. Appellant's expert at trial, testified Mr. Sherman's blood alcohol at the time of the accident was between .12 and .13 (R.T. 309). On November 25, 1981 Mr. Sherman was arrested and charged with manslaughter (192.3 P.C.).

(Continued from previous page)

has indicated that he will rely only on a few documents for the joint appendix. Nissan will, of course, include substantial portions of the court file so that the matter can be reviewed in its totality. All of this will take substantial time. For purposes of this motion and appeal Nissan requests the court augment the record to include the transcript of a hearing before the Honorable V. Gene McDonald on March 2, 1987 (Exhibit A). Appellant originally requested this hearing be part of the transcript on appeal, however, for some reason, it was not included. Insofar as the exhibits of this motion are concerned, they are all pleadings in this case which will be made a part of the joint appendix if necessary and therefore are properly considered at this time.

He hired attorneys[2] (Exhibit B) to defend him and an expert, David Schmidt, to reconstruct the accident. Mr. Schmidt's report is attached as (Exhibit C). Mr. Sherman pled *nolo contendere* to reckless driving with bodily injury (California Vehicle Code § 23104). He was given two years supervised probation and four months in county jail, which was suspended. As part of the probation, he was required to attend an alcohol-drug rehabilitation program, abstain from alcohol, and submit to alcohol testing.[3]

(2) *Civil Proceedings*

Two lawsuits resulted from this accident. On November 23, 1982 Ms. Reiss' father filed an action in Los Angeles County against Mr. Sherman and Nissan. On November 22, 1982 Mr. Sherman filed his original complaint in San Mateo County against Nissan Motor Corporation in U.S.A. On September 25, 1984 Nissan Motor Company, Ltd. was sued as DOE 1. On April 22, 1985 he filed a first amended complaint naming Techne Electronics, the manufacturer of the burglar alarm system in the vehicle. And, on July 9, 1985 he filed a second

---

[2] (1) Michael Bannett; (2) Morse Erskine on or about 1/19/84; (3) Bruce Bailey; (4) pro per through 7/2/84; (4) Eric Woodman – 7/20/84 through 9/2/86; (6) Pro Per – 9/2/86 through 9/15/86; (7) Clark Leslie – 9/15/86 through 11/26/86; (8) Pro Per – 11/5/86 through 2/16/87; (9) Michael Davidson – 2/6/87 through 6/16/87; (10) Daniel U. Smith – 6/16/87 through 10/87; (11) Brian Thorne – 10/21/87 through present.

[3] These facts were obtained from Mr. Sherman's probation report in the San Mateo County Probation Department file. Mr. Sherman's Attorney, Morse Erskine, testified at trial that Mr. Sherman was given one year's probation and Mr. Erskine could not remember the terms of probation (R.T. 245)

amended complaint naming Peninsula Datsun, the selling dealer.[4] On February 1, 1984 the two actions were coordinated and the Honorable V. Gene McDonald was appointed as the coordination judge. On June 12, 1986 Judge McDonald set the case for trial on January 12, 1987 (Exhibit D).

Between the time it was set for trial and September, 1986 Mr. Sherman's attorney, Mr. Woodman, withdrew and Clark G. Leslie took over. At the same time, after various motions, Peninsula Datsun appeared. Because of these event the parties agreed to a status conference on October 10, 1986 to determine whether the trial would be continued and outline the remaining discovery. Over Mr. Sherman's objection the court continued the trial until March 9, 1987. The court also ordered expert disclosures on December 15, 1987 and established a discovery cut-off fifteen days prior to trial. A mandatory settlement conference was set for January 23, 1987 (Exhibit E).

On or about November 26, 1986 Mr. Leslie substituted out of the case, so there was another status conference on December 11, 1986 to see if the case would still be going to trial. During the conference Mr. Sherman told Judge McDonald that he wanted the case to go to trial and he would represent himself, if necessary. The trial date was not vacated and Judge McDonald told Mr. Sherman he could do as he wished, but advised him to get an attorney. There were also discussions about settling the

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[4] Appellant contended the burglar alarm activated and caused a steering lockup. This theory was abandoned at trial.

coordinated Los Angeles action; nobody had any authority so the discussions were continued until the mandatory settlement conference, with the understanding that the Los Angeles action may settle before then (Exhibit F).

The Los Angeles plaintiff's counsel requested a settlement conference on January 21, 1987 with Judge Veal. The Los Angeles action was settled the Techne Electronics and Peninsula Datsun also settled the San Mateo action with Mr. Sherman. During the hearings, the court told Mr. Sherman that once the matter was uncoordinated the trial date would be vacated. He strongly objected and indicated he would not settle with Techne and Peninsula Datsun and thereby obstruct any settlement of the Los Angeles action in order to keep the matter in its coordinated status so it would proceed to trial as scheduled (Exhibit G)[5]. As a result, Judge Veal advised Mr. Sherman that every effort would be made to keep the trial date and also told him to file an at-issue memorandum (Exhibit H).

In view of Mr. Sherman's position Nissan continued to prepare for trial. On January 30, 1987 Nissan noticed the depositions of Mr. Sherman's experts, Dr. Lunde, and Messrs. Kramer and Schmidt for February 17, 18, and 19, 1987 respectively. And, on February 6, 1987 Nissan scheduled an IME for Mr. Sherman for February 16, 1987 (Exhibits I and J).

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[5] The Carriers for Techne and Peninsula Datsun were willing to settle *only* to avoid trial expenses. Therefore, if Mr. Sherman would not settle, there was no reason to settle with Mr. Reiss.

On February 9, 1987 Michael Davidson substituted into this case as appellant's counsel. He advised Nissan's counsel that the experts' depositions would have to be rescheduled since he was set for trial the week of February 16, 1987. Nissan agreed, on the condition the depositions would be rescheduled. Mr. Kramer could not change his plans so his deposition went as scheduled. Mr. Schmidt and Dr. Lunde's depositions were continued and Mr. Davidson agreed to advise Nissan of the new dates. Several days passed, and Mr. Davidson did not reset the depositions and when Nissan contacted him on the subject he refused to set the depositions, indicating, for the first time, that in his opinion discovery had closed and he would not produce his experts. Mr. Davidson was immediately advised that all discovery requests were timely and that discovery would not close until fifteen days prior to trial pursuant to Judge McDonald's order on October 10, 1986 (Exhibit E).

Mr. Davidson ignored the Court's order and said he would not comply with any discovery absent another court order. On February 25, 1987 Nissan was forced to file a motion to compel attendance at depositions, IME, and production of documents which was heard on March 2, 1987 (Exhibit A and K). The court granted the motion and the IME and depositions were set. Mr. Schmidt's deposition was taken on March 3, 1987 at Mr. Davidson's office.

The trial started on March 9, 1987 and ended on April 7, 1987 with a unanimous verdict for Nissan Motor Corporation in U.S.A. and Nissan Motor Company, Ltd. On May 18, 1987 appellant filed a notice of appeal.

III. *THE COURT SHOULD DISMISS THE APPEAL DUE TO THE INADEQUACY OF THE OPENING BRIEF AND RECORD RELIED UPON BY APPELLANT.*

A. *Appellant's Brief Must Review The Entire Case.*

Article II, § 13 of the California Constitution provides:

> "No judgment shall be set aside, or new trial granted in any case on the ground of misdirection of the jury or of the improper admission or rejection of evidence, or any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

B. *If Appellant Does Not Review The Entire Cause The Court Will Not Consider The Appeal.*

The appellant has an ethical obligation and legal duty to include a complete factual and procedural background in his appeal so the court has a complete record to consider and respondent knows what to respond to. Absent this, the court need not consider an appeal, since appellant cannot place the burden of searching the record to support his case on the court or respondent.

In *Wiley v. Wiley*, 183 Cal. App. 2d 588 (1960), the court refused to consider a question when the relevant evidence was neither stated nor substantiated. The court stated:

> "To deserve consideration of the claim of insufficient evidence there must be a statement of the evidence upon which the court found the facts.

> *An appellant cannot thrust upon the respondent and the court the entire task of searching for evidence that lends support to questioned findings."* (Emphasis added) (183 Cal. App. 2d 588, 591).

In *Margott v. GEM Properties, Inc.*, 34 Cal. App. 3d 849 (1973) the appellate court summarily rejected appellant's contentions on the grounds that appellant failed to include a summary of material facts bearing on the issues, in the opening brief. The court said:

> "We summarily reject appellants' contentions of lack of substantial evidence supporting the trial court's award . . . appellants' opening brief contains no summary of material facts bearing on those issues as required by Rule 13, California Rules of Court. Since each issue . . . involves a question of fact, appellants' omission prevents this court from considering the contentions unless we ourselves search the record for error. That we will not do." (34 Cal. App. 3d 849, 853).

This rule is particularly important in a case where appellant claims there has been an abuse of discretion since a factual and procedural review is required to determine it there has been any abuse. Absent this detail, it will be impossible to review the court's behavior and reasoning.

C. *The Court Should Not Consider This Appeal.*

The sole issue here is whether the court abused its discretion when it precluded appellant's witness from changing his deposition testimony and giving different opinions at trial concerning: (1) unwanted acceleration, (2) a defect in the ignition module causing a steering lockup, and (3) the vehicles non compliance with Federal

Motor Vehicle Standard (FMVSS) 114. To carry his burden appellant must establish the abuse of discretion standard applies and that the court abused its discretion. And, to do this appellant must analyze all of the facts and procedural steps concerning these rulings and show the alleged abuse was prejudicial (*California Civil Appellate Practice*, 2d Ed., C.E.B. §§ 4.17-4.29).

For purposes of this motion Nissan does not question whether the abuse of discretion standard applies. But even if you give appellant that, he has nothing else: no facts, no procedural review; nothing except excerpts from his counsel's arguments which are replete with misrepresentations.

(1) *Appellant Does Not Explain The Facts Or Procedures Involved.*

While appellant has accurately identified the date and place of the accident, nothing else which is truthful or relevant to the issues here has been set forth. A review of some facts appellant omitted, highlights the deficiencies and disingenuousness of the appeal. For example:

1. He was not explained that Mr. Schmidt was retained on February 17, 1982 an that he issued his "final report" on December 14, 1982. Instead appellant refers to a supplemental report prepared on January 27, 1987 (R.T. 867, 942, 943 and Exhibits C and C-1). And, these were not cited as part of the joint appendix.

2. Appellant does not tell the court the Trial Judge told him on the first day of trial what he rules would be concerning expert trial testimony (R.T. 75-79).

3. Appellant does not describe the nature an extent of all the hearings the court had concerning the proposed testimony.

4. Appellant does not point out that the Trial judge gave him numerous opportunities to argue the evidentiary rulings and submit authorities. And, that it was on the court's own motion that appellant was given additional time and the matters were re-heard on March 23, 1987.

5. That Nissan submitted trial briefs, motions in limine and memoranda to support every position they took.

6. That appellant's attorney admitted there was no evidence to support unwanted acceleration and defective module claims (R.T. 509, 510, 519).

7. Appellant does not explain that Mr. Schmidt said the vehicle complied with FMVSS 114 at his deposition and, based on the same documentation changed his opinion at trial (R.T. 760-761).

The brief is also deficient for its failure to outline all the procedures involved. Appellant, in essence, only refers to the hearing on March 23, 1987. There were several before that and many status conferences, prior to trial, where discovery issues were considered and orders issued.

Instead of reviewing and analyzing the case as he must appellant is attempting to re-argue what has been said below, and relied on misstatements by his trial counsel. For example, the basis for all appellant's arguments are alleged statements made by Judge McDonald and his

trial counsel at the March 2, 1987 hearing of Nissans' discovery motions.

According to the opening brief Mr. Davidson allegedly said he told counsel for Nissan that Mr. Schmidt was not ready to be deposed. That simply is not true. What he did say was:

> "That's confirmed to take place in my office and they have ordered the court reporter. *We are ready to proceed at that time and Mr. Schmidt is aware of that.*" (Exhibit A, Page 4, Lines 16-19).

As far as Judge McDonald's alleged statements are concerned, the transcript from the hearing shows he did not say what appellant represents. When there are no facts or procedural history to support an alleged abuse of discretion, an appellant has two choices: (1) not filing the appeal or (2) file it and present an inadequate brief and cause the court and respondent to spend enormous amounts of time and money to explain why there is no case. They do not have to do that. If the brief is inadequate, as it is here, the matter should be dismissed.

IV. *EVEN IF THE COURT CONSIDERS THE OPENING BRIEF THE RECORD ESTABLISHES THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.*

It is well known that the lower court is vested with wide discretion to prevent abuses, the exercise of which will not be disturbed on appeal in the absence of a clear showing the court acted unreasonably *Williams v. Volkswagenwerk Aktiengesellschaft*, 180 Cal. App. 3d. 1244, 1255 (1986). If the trail court followed proper procedures and

reached a reasonable result then the appellate court will find the discretion was properly exercised.

In *Bullis v. Security Pacific National Bank,* 21 Cal. 3d. 801 (1978) the court suggested a three part analysis to determine whether there has been an abuse of discretion: (1) whether the discretion was exercised according to law, (2) whether the decision was supported by the facts and procedures, and (3) whether other polices suggest a different result. Overriding all these elements is the fundamental requirement that the alleged error be prejudicial.

A. *The Court Did Not Abuse Its Discretion With Respect To The Precluded Evidence.*

Appellant has not and cannot establish the court abused its discretion when it precluded his expert from testifying on unwanted acceleration, an alleged defect in the ignition module, and the vehicle's non-compliance with FMVSS 114.

(1) *The Rulings On Each Item Of Evidence Were According To The Law.*

A court can limit an expert's trial testimony when the proposed testimony is different than that provided during discovery and the further different opinion could have been rendered previously, but was not. (*Kennemur v. State of California,* 133 Cal. App. 3d. 907 (1982).

In *Kennemur, supra.,* plaintiff's experts were deposed and testified they would not render certain opinions. At trial the expertise tried to give further and different opinions. The Court precluded that evidence on the grounds

that the information was not disclosed during the expert's deposition or in the expert disclosures.

The Court first noted that discovery in California is important but particularly important with respect to experts, the Court stated:

> "The right to engage in discovery of the opinion of the experts who will appear as witnesses for one's opponent at the trial of the case is not at all contingent on a showing that the one seeking discovery does not have equal access to the facts upon which such expert's opinion is based. Rather, it seems from the necessity of preparing to cope with that expert when he does take the witness stand at trial. The decision that a particular consultant will be called to the witness stand means that the other side must gear up for the cross-examination of that expert and must Marshall evidence to rebut his opinion. If anything, the need for pretrial discovery as an aid to the preparation of cross-examination and rebuttal is greater with respect to the expert witness than it is in the case of an ordinary fact witness." (133 Cal. App. 3d. 907, 916-917).

An Expert cannot try to avoid the Kennemur rule and Requirements of the California Discovery statutes through self induced ignorance and wait for the completion of his deposition to do his work and then provide the results of that work at trial. The attorney and expert have an obligation to make sure the expert is prepared to give his opinions at his deposition. If an expert is not prepared properly, his Testimony is properly limited at trial.

Appellant contended at trial and does so here that *Williams* changed California law. He is wrong. The determination as to the limitation of an expert's opinion is

discretionary with the trial Court based upon the facts in each particular case. In *Williams*, the deposition of the experts were taken well before trial and they clearly indicated that different opinions may be forthcoming. Furthermore, the Williams experts, only had limited access to the vehicle which was the subject of their opinions. Most important is the fact the parties had notice of the new and different opinions. The experts were going to testify about.

In this case, Mr. Schmidt worked on the case for nearly five years and issued two separate reports. In fact, since his initial work involved criminal proceedings it would be reasonable to assume he would have come up with all his opinions early on, in order to save his client from jail. He was deposed six days prior to trial and, after all his years on the case, said he had no opinion concerning unwanted acceleration, a defect in the ignition module, or that the vehicle did not comply with FMVSS 114. Appellant did not (1) give Nissan any notice Mr. Schmidt would be providing further and different testimony, or (2) make any showing that the proposed testimony could not have been given before trial. Under the facts here, the court's order was supported by the law (R.T. 1007-1014).

(2) *The Court's Ruling Was Supported By The Facts And Procedures.*

Appellant would have the court to believe the Judge's decision was made in a vacuum. This is absolutely false. Mr. Schmidt was retained on February 17, 1982 to reconstruct this accident (R.T. 867). On December 14, 1982 he issued his report (Exhibit C) and on January

27, 1987 he issued a supplemental report pursuant to appellant's mother's request (Exhibit C-1, R.T. 942-944). His deposition was taken on March 3, 1987 six days before trial. In it, he said he had no opinions as to whether there was unwanted acceleration in this case or that a defect in the ignition module caused steering lockup. He also testified the vehicle complied with FMVSS 114. In addition to his testimony, he identified categories of documents in his file that were related to steering lockups and unwanted acceleration. As to those, he testified that he was not relying on any of the documents for any opinion in this case.

Mr. Schmidt was scheduled to begin testifying on March 18, 1987. On March 17, 1987 the court held a lengthy hearing concerning the scope of Mr. Schmidt's trial testimony. It quickly became clear appellant's counsel would attempt to have Mr. Schmidt render further and different opinions to provide unsupported speculative testimony concerning this case. The court reviewed the deposition testimony in detail, listened to arguments of counsel, and questioned Mr. Schmidt. Then, the court issued an advisory ruling that Mr. Schmidt would not be permitted to testify about: (1) unwanted acceleration, (2) an alleged defect in the ignition module resulting in steering lockup, and (3) the vehicle's alleged failure to comply with FMVSS 114. After making its ruling, the court told appellant's counsel he could have additional time to cite authority to support his position.

On March 18, 1987 prior to Mr. Schmidt taking the stand there was a further hearing concerning Mr. Schmidt's testimony. Appellant's counsel said he had no

further authorities, so the court confirmed its order (R.T. 580-581).

(a) *Testimony Concerning Unwanted Acceleration.*

The Court's review of Mr. Schmidt's deposition testimony and proposed trial testimony was lengthy and detailed (R.T. 501-515 and 521). The court reviewed the deposition and established Mr. Schmidt did not have an opinion regarding unwanted acceleration in this case. During the hearing appellant's counsel admitted that there was no evidence of unwanted acceleration in this case nor any evidence to support any such claim, in general (R.T. 508-510). Based on that, and the fact that Mr. Schmidt did not have an opinion regarding unwanted acceleration at his deposition. He was prohibited from testifying on that issue.

(b) *Testimony Concerning A Defect In The Ignition Module Resulting In Lockup.*

Using his deposition, The Court established that Mr. Schmidt testified he had no opinion that there was a defect in the ignition module which would cause a steering lockup. (R.T. 515-535). In fact, the deposition testimony showed that Mr. Schmidt found that there was absolutely no problem with the ignition module, in this case, and that it still functioned properly. On that basis and in view of the fact appellant's counsel admitted that his expert did not know whether there was an ignition lockup, in this case, the court precluded Mr. Schmidt from giving testimony on this subject. At the same time,

Mr. Schmidt had documents in his file marked "steering lockup defect materials". At his deposition, Mr. Schmidt testified that he was not relying any of the documents for opinions in this case. Therefore, the court ruled that those documents could not be used at trial (R.T. 518-519, 533).

(c) *Testimony Regarding FMVSS 114*

Mr. Schmidt testified at his deposition that the 1981 280 ZX complied with FMVSS 114. At trial Mr. Schmidt changed his testimony and said it violated that standard. As a result of his testimony objections were made and there was a hearing outside the presence of the jury (R.T. 751-763). The court reviewed Mr. Schmidt's deposition wherein he was specifically asked whether he had an opinion as to whether the vehicle complied with FMVSS 114 and where he said it did comply based on documents he had both at his deposition and at trial (R.T. 751-763). As a result the court ordered Mr. Schmidt could not change his testimony to say the vehicle violated that standard. On March 19, 1987 the court struck Mr. Schmidt's improper testimony (R.T. 770).

Although the court issued an order concerning Mr. Schmidt's testimony appellant's counsel tried to introduce the prohibited evidence. On March 19, 1987 there was an additional hearing outside the presence of the jury concerning this testimony. At that time, appellant's counsel requested an order he be permitted to use Ralph Kramer as an expert to testify to the items Mr. Schmidt was precluded from talking about. The court advised Mr. Davidson there was a statute and procedure to follow and

suggested he do so and gave him time to prepare the appropriate papers (R.T. 779).

On March 20, 1987 appellant's counsel telephoned the court and cited *Williams, supra.*, in support of his request. The court, in turn, contacted NISSANS' counsel and said there would be a hearing on March 23, 1987 to consider appellant's request.

Nissan prepared a memorandum of points and authorities in opposition to appellant's request concerning Mr. Kramer. Nissan also provided authorities in support of the court's prior orders limiting Mr. Schmidt's testimony (Exhibit L). As Nissan expected, appellant filed a motion on March 23, 1987 and it included a request concerning Mr. Kramer as well as a request to reopen direct examination of Mr. Schmidt with respect to those areas which the court previously ordered barred (Exhibit M.). The hearing, like the others, was long and detailed. The court listened to all parties, considered all facts, and followed proper procedures and denied the motion (R.T. 908-929 and 1007-1014).

Appellant's argument on the motion, which is essentially the only portion of the Record cited in the opening brief, was similar to everything that was said to the Court before: Appellant's counsel admitted there was no evidence to support these new opinions but thought they should be introduced anyway. He never explained why Mr. Schmidt did not have to opinions at his deposition or the reason why Nissan was never told about them.

The most disturbing aspect of Appellant's Counsel's arguments (who was not the present counsel) is the repeated misrepresentation to the court. Mr. Davidson

said he told Nissan that his expert was not ready to be deposed on 3/2/87. He also said Judge McDonald said the depositions *could* continue through trial. The transcript proves none of this is true (Exhibit A).

3. *Policy Considerations Do Not Permit An Expert To Thwart Discovery And Change His Opinions At Trial Or Provide Speculative Unsupported Testimony.*

It is well known that the policy behind pre-trial discovery in California is to permit the parties to obtain the information they need to prepare and evaluate their case. Discovery is intended to take the gamesmanship out of litigation and prevent trials by ambush. Underlying these purposes is the understanding counsel will act in good faith. These policies are even stronger when expert discovery is involved, since each side must be able to cross-examine and rebut an expert's opinion.

None of these policies would have been furthered if Mr. Schmidt was allowed to testify to his undisclosed opinions indeed, the reverse is true: Mr. Schmidt had worked on the case five years, was deposed six days before trial, and gave all his opinions. there was never any notice that he had additional or different opinion or any situation or condition that would have caused him to perform further work and alter his testimony. Allowing him to testify to his new opinions would have undermined the policy behind the discovery act and prejudiced Nissan by injecting new and different issues.

The truth of the matter in this case is that the proposed testimony was pure unsupported speculations and

appellant's counsel knew it; the issues came up all of a sudden without explanation.

4. *There Has Been No Prejudice.*

Only errors that are prejudicial to the losing party support a reversal. If appellant cannot argue the error contributed to the result of the case or that the result would have been different had the error not occurred, reversal is impossible *California Civil Appellate Practice*, C.E.B. 2nd ed. § 4.23; *People v. Watson*, 46 Cal. 2d 818, 836 (1956)). to determine whether there has been prejudice, each case must be examined on its facts *Bridgeman v. Safeway Stores*, 53 Cal. 2d 443, 450 (1960).

Appellant has not addressed this element in his appeal except through a few general conclusory statements. The court cannot presume prejudice, even under circumstances where the facts seem obvious. In *Dorsic v. Kurtin*, 19 Cal. App. 3d 226 (1971), the court noted that although prejudice apparently resulted from the jury's considering inadmissible evidence, the court could not find prejudice, because it was not shown by appellant.

(a) *Appellant Cannot Show Prejudice.*

Appellant has not shown any prejudice, because there is none. In view of the fact appellant's counsel admitted there was no evidence to support the proposed testimony, it is difficult to imagine the evidence should have been admitted in any event or any prejudice that could result from excluding it.

Appellant has not even established the result in this case would have been any different had the testimony been allowed. In fact, appellant does not provide any argument or even a light discussion of the proposed testimony's importance or relevance to this case.

The reason for this deficiency, like the others, is that there would not have been a different result. The proposed testimony would not have affected Mr. Schmidt's reconstruction and, based on the unanimous verdict, it would not have affected the jury. As a matter of fact, since Nissan established Mr. Schmidt used the wrong vehicle dimension for his reconstruction (R.T. 952-955 1056-1060), it is unlikely the jury even would have listened to Mr. Schmidt's testimony.

B. *The Court's Orders Were Not An Abuse Of Discretion In any Respect.*

Appellant tries to argue that the judge should have stop and continue the trial in midstream and let Mr. Schmidt give a further deposition. Appellant has not cited any authority requiring a trial count to exercise its discretion by continuing a trial instead of precluding undisclosed expert testimony whenever a party chooses to offer it.

What the court did was well within its power and certainly supported by the circumstances. California law has given judges wide discretion for limiting testimony and issuing other similar orders. Former section 2019, subdivision (b), provided the court could regulate the deposition process by making any order required by justice "to protect the party or witness from annoyance,

embarrassment, or oppression." (Stats. 1957, ch. 1904, § 3, p. 3327.) Similarly, the numbers of interrogatories and requests for admissions were limited as required by justice "to protect the party from annoyance, expense, embarrassment, or oppression." (Former §§ 2030, subd. (b), 2033, subd. (a), stats. 1957, ch. 1904, § 3, pp. 3332, 3334; see new Code Civ. Proc., §§ 2023, subd. (a)(3), 2025, subd. (i), 2030, subd. (e), 2031, subd. (e) 2033, subd. (c)(1).)

These statues were interpreted as authoring orders excluding witnesses, testimony, or other evidence not previously revealed in discovery. "An order which bars the testimony of a witness whose name was deliberately excluded in an answer to an interrogatory seeking the names of witnesses protects the interrogating party from the oppression otherwise flowing from the answer. One of the principal purposes of civil discovery is to do away with the 'sporting theory of litigation – namely, surprise at trial.' [Citation.]" (*Thoren v. Johnston & Washer*, 29 Cal. App. 3d 270, 274 (1972), accord, *Deeter v. Angus*, 179 Cal. App. 3d 241, 255 (1986) – willfully concealed tape recording excluded.) Former section 2019, subdivision (b), granted "the court the power to protect the deposing party as well as the party deposed from oppression – here the oppression that would flow from a waiver at trial of the privilege against self-incrimination that had been asserted to block discovery. [Fn. omitted.]" (*A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 567 (1977).) "[T]he enactment of the Discovery Act of 1957 was intended to take the 'game element' out of trial preparation and do away with surprise at trial." (*Id.* at p. 566.) *Crumpton v. Dickstein*, 82 Cal. App. 3d 166, 172 (1978),

held the trial court had erred in refusing to bar the testimony of experts not named, though not willfully omitted, in response to a court order to disclose the names of all anticipated trial witnesses.

No matter whether you look at the judge's order generally, or consider each item separately, there can be no doubt it was proper, justified, and not an abuse of discretion.

V. *THE COURT SHOULD DISMISS THIS APPEAL AND AWARD NISSAN REASONABLE COSTS AND ATTORNEY FEES AGAINST APPELLANT AND APPELLANT'S COUNSEL.*

The court has inherent power to dismiss appeals when it is obvious the case has no merit and/or when they are frivolous (*Ferguson v. Keays*, 4 Cal. 3d 649, 658 (1971); *Estate of D'Avila*, 217 Cal. App. 2d 123 (1963)). In *Robbins v. Sonoma*, 138 Cal. App. 2d App. 2d 291 (1955), the court said:

> . . . appellate courts have inherent power to dismiss appeals which have no merit when the situation is presented on the face of the record and can be readily ascertained. Grave public interest can also justify such preliminary examination as is necessary to determine the presence or lack of merit." (138 Cal. App. 2d 291, 293).

In this case, appellant's opening brief and the record show on their face the appeal has no merit. To support this argument, Nissan incorporates its prior motion to dismiss and the preceding sections. As a matter of public policy and judicial economy, the court should dismiss this appeal.

Nissan should be awarded attorneys fees and costs. After Nissan reviewed Appellant's opposition to the motion to dismiss filed on November 16, 1987, Nissan had a clear understanding of the basis for the Appeal. Nissan's counsel wrote to Appellant's counsel, on January 22, 1988, requested a dismissal, and included citations to the Record that supported Nissans' position (Exhibit N). Mr. Thorne did not respond to the letter so an additional letter was sent on March 28, 1988 (Exhibit O).

Nissan has given Appellant every opportunity to review this case with specific emphasis on the issues on appeal. Appellant ignored Nissan and, instead, proceeded based on an inadequate record and relying on misrepresentations of appellant's trial counsel, which Nissan said were untrue.

Nissan has been forced to incur approximately $30,000.00 in costs and fees in connection with this appeal (Exhibit P). It is frivolous, without merit, and should be dismissed and the court should order appellant and/or appellant's counsel pay Nissans' fees and costs.

VI *CONCLUSION*

Nissan has established this appeal has no merit and can be dismissed on any number of grounds. First, because the record is inadequate. Second, because there has been no abuse of discretion. And, third because it is without merit. For all these reasons and those set forth in the prior motion to dismiss, the appeal is frivolous.

The Court should dismiss the appeal and/or affirm the trial court's orders and the judgment. At the same

time, the Court should award Nissan its fees and costs associated with the appeal.

Dated: June 2, 1988.

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN & ENERSEN

By /s/ Vincent Galvin
Vincent Galvin
Attorneys for Defendant
NISSAN MOTOR CORPORATION IN U.S.A.
and
NISSAN MOTOR COMPANY, LTD.

PROOF OF SERVICE BY MAIL

I am over the age of 18 years, not a party to this cause and employed by McCutchen, Doyle, Brown & Enersen in the City of San Jose, County of Santa Clara, at Market/ Post Tower, Suite 1500, 55 South Market Street, San Jose, California 95113. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business. On June 3, 1988, 1988, I served the foregoing NISSANS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS A FRIVOLOUS APPEAL AND FOR FEES AND COSTS AND REQUEST FOR AN EXTENSION TO FILE THE RESPONSE BRIEF AND JOINT APPENDIX by placing copies in sealed envelopes for collection and mailing

on that date following ordinary business practices. The names and addresses of the persons served, as shown on the envelopes, is/are as follows:

Brian G. Thorne, Esq.
Law Offices of Robert C. Swanson
14724 Ventura Boulevard, Suite 1200
Sherman Oaks, California 91402

Honorable John G. Schwartz
Judge of the Superior Court
County of San Mateo
401 Marshall Street
Redwood City, California 94063

These documents were placed for deposit in the United States Postal Service on that date, at the place of business set forth above.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration and executed this 3 day of June, 1988.

/s/ Patricia A. Lauwers
Patricia A. Lauwers

APPENDIX F

P57:dclbrian

The Law Offices Of
ROBERT C. SWANSON
A Professional Corporation
14724 Ventura Boulevard
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Attorney for Appellants

PATRICIA WILSON HANNA and WILSON ROBERT SHERMAN, Appellants, v. NISSAN MOTOR CORPORATION IN U.S.A., etc., Respondents.	Case No. A038665 San Mateo Superior Court Case No.: 269 509

LAW OFFICE OF ROBERT C. SWANSON'S OPPOSITION TO RESPONDENT'S REQUEST FOR FEES AND COSTS AGAINST ROBERT C. SWANSON'S OFFICE, DECLARATION OF BRIAN G. THORNE AND POINTS AND AUTHORITIES IN SUPPORT THEREOF.

DECLARATION OF BRIAN G. THORNE

I, BRIAN G. THORNE, DECLARES AS FOLLOWS:

1. I am an attorney licensed to practice law in the State of California and am an associate of the Law Offices of Robert C. Swanson. All the facts stated herein are

within my own personal knowledge and if requested I could and would testify to the truth thereof.

2. On May 18, 1987, Appellant filed his Notice of Appeal. Our office substituted in in place and instead of the Appellant in pro per and filed the substitution on November 16, 1987.

3. On that same date, November 16, 1987, Respondents' filed their Motion to Dismiss the appeal on the grounds it was frivolous and meritless. Our office did not receive that Motion until November 19, 1987. Appellant, WILSON ROBERT SHERMAN, had only a few days earlier provided us with the Reporter's transcript and requested that we oppose the motion.

4. I immediately arranged a conference in Northern California with Mr. Sherman's trial counsel, Michael L. Davidson, to discuss the case. Mr. Davidson assured me that the record would show that expert testimony had been erroneously excluded which he believed resulted in the defense verdict. Due to my calendar it was impossible to review the entire Reporter's transcript (1977 pages) and Court file before Opposition was due, so I filed Opposition based on Michael L. Davidson's Declaration.

5. After the Motion to Dismiss was denied I began reviewing the Record. Appellant had presented many points to me, but I had to first review the entire Record before determining what points had merit.

6. During conversations with opposing counsel, Vincent Galvin, I informed him of representations Michael Davidson stated were on the record and that I was ethically obligated to review the entire record and pursue

any meritorious claims my client had. Although Vincent Galvin sent me a letter outlining those portions of the Reporter's transcript that he felt supported his position, he never provided me any evidence that showed that representations by Mr. Davidson were untrue until after I had filed Appellant's Opening Brief. I also never asked him to outline the record because I had to read the entire record myself anyway. I had been told by two (2) trial counsels, Mr. Galvin and Mr. Davidson, two (2) different versions of what occurred in the lower Court.

7. After completing review of the Reporter's transcript and preparation of my brief I called Vincent Galvin on April 30, 1988. Mr. Donald Howard returned my call and I informed him that I wanted to meet concerning preparation of the Joint Appendix and that I would move to augment the record for a transcript of proceedings before Judge McDonald, one week before trial. I felt that this transcript would support our position based on what Michael Davidson had told me.

8. About a week later Vincent Galvin called me and during our discussion he informed me for the first time that he had a copy of the transcript before Judge McDonald and that it showed that Michael Davidson's representations to the Trial Court were untrue. I asked him to please send me a copy to review with the Appellant and that if he needed to request an extention of time to file his brief I would not object. He did not send me the transcript until about May 27, 1988. Before I had time to review it with my client, Mr. Galvin had filed this Motion to Dismiss.

9. I advised Mr. Sherman that based on what appeared to be misrepresentations by Michael Davidson, both to the trial court and me, I believed that the appeal may no longer have merit and he should dismiss it.

10. Wilson Sherman refused to dismiss the Appeal. I also informed him that I am ethically prevented from further representation and pursuit of the Appeal after discovery of this new information. He therefore requested that he be substituted in pro per and concurrently request an extension in which to oppose the Motion to Dismiss. I have concurrently filed herewith the Substitution of Attorney and on behalf of Appellant an Application for an Extension to File Opposition to the Motion to Dismiss.

11. With respect to the declaration of Vincent Galvin in support of the Motion to Dismiss, I do not believe the Reporter's transcript showed that Michael Davidsons representations were untrue. This did not come to light until disclosure of the transcript of proceedings before Judge McDonald, which transcript was not provided to me as part of the record.

Further, during our conversations I did not advise Mr. Galvin that I had not reviewed his citations to the record, but that I was reviewing the entire record, not just those citations.

12. It is my belief that our office did everything possible to pursue all meritorious claims our client may have had based on what information was available to us and on the record before this Court. Although Respondent, like Appellant, incurrs fees and costs for an Appeal, this law firm did not participate in any conduct which

caused Respondent to unreasonably incurr attorneys fees and costs.

I declare under penalty of perjury that all the foregoing is true and correct.

Executed this 17th day of June, 1988, at Sherman Oaks, California.

BY: /s/ Brian G. Thorne
BRIAN G. THORNE

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ROBERT C. SWANSON'S OPPOSITION TO RESPONDENT'S REQUEST FOR ATTORNEYS' FEES AND COSTS

In determining whether the attorney should be held to pay the opposing party's attorneys' fees and costs, this Court can look to the standards set forth in the case of *In Re Marriage of Flaherty*, 31 Cal. 3d 649, 183 Cal. Rptr. 508 (1982):

> "An appeal should be held to be frivolous only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit. (See Estate of Walters, 99 Cal. App. 2d at pages pp. 558-559, 222 P. 2d 100 (1950).
>
> However, any definition must me read so as to avoid a serious, chilling effect on the assertion

> of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. Counsel should not be dettered from filing such appeals out of a fear of reprisals. Justice Kaus stated it well. In reviewing the dangers inherent in any attempt to define frivolous appeals, he said the Courts cannot be "blind to the obvious: the borderline between a frivolous appeal and one which simply had no merit is vague indeed . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used." *People vs. Sumner*, 262 Cal. App. 2d 409, 415, 69 Cal. Rptr. 15 (1968). The same may be said about the power to punish attorneys for prosecuting frivolous appeals: the punishment should be used most sparingly to deter only the most egregious conduct.
>
> Vague definitions of what constitutes a frivolous appeal raise the danger that attorneys will be dettered from asserting valid claims out of a fear that they will incur Court sanctions. This in turn will deprive their client of their day in Court.

In Re Marriage of Flaherty, supra at 516-517.

Viewed under these standards, the Law Offices Of Robert C. Swanson should not be held to pay Respondent's attorneys' fees and costs because there is no evidence of any subjective bad faith on its part and that they would gain anything from delay. The Law Offices of Robert C. Swanson were not the trial attorneys and in determining the merits of Plaintiff's appeal only had what record was available to them and argument as represented by both trial counsel for Plaintiff, MICHAEL L.

DAVIDSON and counsel for Defendant, VINCENT GALVIN and DONALD HOWARD. Immediately after Robert C. Swanson's office discovered additional information which it believed shed light on the merits of Appellant's position it advised Appellant as to the proper way to proceed. Since the Appellant chose not to take his attorney's advice and Robert C. Swanson's office determined that it could not in good faith continue to proceed, Appellant chose to substitute himself in pro per in place and instead of Robert C. Swanson's office and proceed with the appeal.

Therefore, the Law Offices of Robert C. Swanson respectfully request that this Court find that they did not commit any bad faith conduct which caused Respondents to incur attorneys' fees and costs, and deny Respondents' request for fees and costs against the Law Offices Of Robert C. Swanson.

DATED:

Respectfully submitted,

LAW OFFICES OF
ROBERT C. SWANSON
By:/s/ Brian G. Thorne
BRIAN G. THORNE
Predessor Attorneys for
Appellant Wilson
Robert Sherman

(PROOF OF SERVICE BY MAIL –
1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of/employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address/residence address is: 14724 Ventura Blvd., Suite 1200, Sherman Oaks, Ca. 91403. *On* June 17, 1988 *I served the foregoing* Robert C. Swanson's Opposition To Respondent's Request For Attorney's Fees and Costs: Memorandum Of Points And Authorities and Declaration of Brian G. Thorne in Support Thereof *on* all interested parties *in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Sherman Oaks, *California, addressed as follows:*

McCutchen, Doyle, Brown & Enerson
Donald D. Howard
Vincent Galvin
Market/Post Tower, Suite 1500
55 South Market Street
San Jose, Ca. 95113

Honorable John G. Schwartz
Judge of the Superior Court
County of San Mateo
401 Marshall Street
Redwood City, Ca. 94063

I certify (or declare), under penalty of perjury under the laws of the State of California, that the foregoing is true and correct:

June 17, 1988
Date

/s/ Debra L. Lyles
Signature of Declarer

Debra L. Lyles
Type or print name of Declarant

APPENDIX G

LAW OFFICES OF ROBERT C. SWANSON
A Professional Corporation
14724 Ventura Boulevard, Suite 1200
Sherman Oaks CA 91403

Attorney(s) For Appellant WILSON SHERMAN

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

WILSON SHERMAN, Appellant, vs. NISSAN MOTOR CORPORATION, Respondent.	Case Number A 038 665 SUBSTITUTION OF ATTORNEY

APPELLANT WILSON SHERMAN hereby substitutes WILSON SHERMAN, in pro per (address) 5609 Colfax #250, North Hollywood, CA 91601 (phone number) (818) 985-3844 as attorney(s) of record in place and stead of THE LAW OFFICES OF ROBERT C. SWANSON

Dated: June 17, 1988 /s/ Wilson Sherman
(Signature of Party)
WILSON SHERMAN

I consent to the above substitution.

Dated: June 17, 1988

Above substitution accepted.

Dated: June 17, 1988

THE LAW OFFICES OF
ROBERT C. SWANSON

/s/ Illegible

By: BRIAN G. THORNE

Wilson Sherman
(Signature of New Attorney)
WILSON SHERMAN, in pro per.

SUBSTITUTION OF ATTORNEY

APPENDIX H

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

WILSON ROBERT SHERMAN, Plantiff and Apellant, vs. NISSAN MOTOR CORPERATION IN U.S.A., ET AL., Defendants and Respondants.	)	No. A038665 SAN MATEO NO, 269509

APPELANT'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

WILSON SHERMAN (PRO PER)
5460 WHITE OAK AVE.
C336
ENCINO, CA 91316

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THE BIBLE
Exodous chapter 20 verse 13 "Thou shall not kill"
Mark chapter 10 verse 19 "Do not kill"
Mathew chapter 5 verse 7 "Blessed are the merciful for they shall obtain mercy"
Plus new precedents

APPELANT'S OPENING STATEMENT

Case number 269509 and appeal number A038665, has always been an effort to have Nissan Corperation, ammend a lethal car defect, and thereby spare the lives of innocent men, women, and children (please see exhibits 1-7). In 1987 Nissan Corperation finally altered their steering lock design to prevent inadvertent lock-up, and bring themselves in line with de facto American safety standards, and FMVSS 114 s4.2 (see exhibit 6,7). This change of design is an admission of design defect, therfore there are approximately sixteen years of Nissan vehicles with a lethal and unlawful defect on the road. Due to theis *EXTREME PUBLIC ENDANGERMENT*, we pray the Court will grant a new trial in the effort to spare the lives of innocent people.

CONTENTION ONE

This appeal would not have been necessary had we been granted a fair and impartial trial by Judge Schwarz. However, we contend that Judge Schwarz was biased and prejuidiced on behalf of the defendant, and consequently causing us an unfair trial. Here are examples of his prejudice and bias:

1) The Judge would not allow crucial witnesses to testify. These were people that had experienced harmfuls steering lock-ups in Japanese vehicles, that drew an obvious corelation to Nissan from same design defect.

2) The Judge would not let our key witness testify based on legal technaclities, striking such remarks from Mr. Schmidt that Nissan's design defect presented public endangerment, and was harming and killing.

3) The Judge allowed no discussion of Nissan's ammended design the crux of any product liability case.

4) Judge Schwarz barred crucial evidence such as the American standard for steering locks, in which one must be in park to activate lock (or hard to reach button) thusly not allowing serious consideration of the danger of inadvertent lock-up in Nissans capable of this hazard.

5) The Judge ruled that an obscure warning in Nissan's driver handbook, a warning that is not required reading, not available in many used cars, not read by those borrowing cars, was an adequate warning, again biasing jury.

6) The Judge ruled out punitive damadges normal in product liablility. (See exhibit 5 proving judicial error here)

CONTENTION TWO

The defendant's motion to dismiss is based on legal error perpetrated by the plaintiff's attorneys, that at the rial cost the plaintiff his expert witness testimony, and is again be allegated to be grounds for the dismissal of this appeal.

The plaintiff maintains he acted in good faith to rely on the competence of attorneys licensed to practice in the State of California, in the courts of Califonia. If these said attorneys were to loose a case from grevious legal error, or outright incompetence, this should not be the responsility of the plaintiff (or defendant) but rather the responsiblity of the State of California, who were relied upon in good faith to have properly licensed/*allowed* an attorney to practice law.

Surely in the light of judicial wisdom, a recognition of greivous legal error and or attorney incompetence that caused a client to loose a case or appeal, would be a breach of good faith between the client and the State Court, so thusly is indeed grounds for a new tiral to insure the plaintiff/defendant has proper State approved representation.

APPENDIX I

McCUTCHEN, DOYLE, BROWN & ENERSEN
Donald D. Howard
Vincent Galvin
Market/Post Tower, Suite 1500
55 South Market Street
San Jose, California 95113
Telephone: (408) 947-8400

Attorneys for Defendants and Respondents
NISSAN MOTOR CORPORATION
IN U.S.A. and
NISSAN MOTOR COMPANY, LTD.

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

WILSON ROBERT SHERMAN, Appellants, v. NISSAN MOTOR CORPORATION IN U.S.A., and NISSAN MOTOR COMPANY, LTD., Respondents.	No. A038665 San Mateo Superior Court Case No.: 269509 RESPONSE TO APPELLANT'S OPPOSITION TO NISSANS' MOTION TO DISMISS (Filed July 8, 1988)

Appellant's opposition is legally and factually incompetent and the exhibits are not part of the record and improper, as well.

Appellant has now established exactly what Nissan has attempted to establish all along. This appeal has no

merit and should be dismissed. Nissans' initial response is simply to say "we told you so".

Dated: July 7, 1988.

McCUTCHEN, DOYLE, BROWN
& ENERSEN

By /s/ Vincent Galvin
Vincent Galvin
Attorneys for Respondents
NISSAN MOTOR CORPORATION
IN U.S.A.
and
NISSAN MOTOR COMPANY, LTD.

PROOF OF SERVICE BY MAIL

I am over the age of 18 years, not a party to this cause and employed by McCutchen, Doyle, Brown & Enersen in the City of San Jose, County of Santa Clara, at Market/ Post Tower, Suite 1500, 55 South Market Street, San Jose, California 95113. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business. On July 7, 1988, I served the foregoing RESPONSE TO APPELLANT'S OPPOSITION TO NISSANS' MOTION TO DISMISS by placing copies in sealed envelopes for collection and mailing on that date following ordinary business practices. The names and addresses of the persons served, as shown on the envelopes, is/are as follows:

Mr. Wilson Sherman
5460 White Oaks Avenue, C336
Encino, California 91601

Honorable John G. Schwartz
Judge of the Superior Court
County of San Mateo
401 Marshall Street
Redwood City, California 94063

These documents were placed for deposit in the United States Postal Service on that date, at the place of business set forth above.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct and that this declaration was executed this 7th day of July, 1988.

/s/ Patricia A. Lauwers
Patricia A. Lauwers

APPENDIX J

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

WILSON ROBERT SHERMAN,	A038665
Plaintiff and Appellant,	(Super. Ct. No. 269509 San Mateo County)
v.	
NISSAN MOTOR CORPORATION IN U.S.A. et al.,	(Filed October 26, 1988)
Defendants and Respondents. /	

The motion of respondents Nissan Motor Corporation in U.S.A. et al. to dismiss the appeal is denied.

Appellant's opening brief is ordered stricken for failure to comply with California Rules of Court, rules 13 and 15(a). (*Berger v. Godden* (1985) 163 Cal.App.3d 1113.)

Appellant has 30 days from the date of this order to file a new or revised brief which complies with the California Rules of Court and with case law requirements cited above. In the event appellant fails to do so, or in the event that he again files a brief which does not conform to the requirements of the Rules of Court and the law of this state, the appeal will be dismissed.

Respondents' motion to augment the record is deferred until appellant's new opening brief is filed. The time for filing respondents' brief is extended accordingly.

Dated: October 26, 1988.

/s/ WHITE, P.J. , P.J.

McCutchen, Doyle, Brown & Enersen
Howard, Donald D.
55 South Market St.
San Jose, CA. 95113

APPENDIX K

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

WILSON ROBERT SHERMAN, Plaintiff-Appellant, v. NISSAN MOTOR CORPORATION IN U.S.A., et al., Defendants-Respondents.	No. A038665 San Mateo NO.: 269509

APPELLANT'S OPENING BRIEF

WILSON ROBERT SHERMAN
5460 White Oak, C336
Encino, CA 91316
(818) 501-2948
Plaintiff-Appellant
In Pro Per

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STATEMENT OF ISSUES

Plaintiff WILSON ROBERT SHERMAN hereby appeals judgment entered against Plaintiff and for Defendant NISSAN MOTOR CORPORATION IN U.S.A. (hereinafter "Nissan"), filed as San Mateo Superior Court Case No. 259509. Said action was brought by Plaintiff to recover damages sustained by Plaintiff in an automobile accident in which his fiance was killed and he sustained multiple physical and emotional injuries.

It is Plaintiff's contention that the accident occurred as a result of a design defect in the steering column of the Nissan vehicle, in that an unavoidable inadvertent lockup occurred while the vehicle was in motion and being driven by Plaintiff; and that inadvertent lockup was the exclusive causal factor of the subject accident which occurred as a result of Plaintiff's subsequent loss of control of the vehicle.

Through this appeal, Plaintiff seeks to reverse judgment herein on the following grounds:

1. In the interest of public safety, Plaintiff seeks desperately to make the public aware that Defendant Nissan altered its steering lock design in 1987 as a *remedial* action in an attempt to *correct* the death-causing defect which is still present in cars which are older than 1987. The general public will continue to suffer fatalities or others injuries and to be exposed to extreme endangerment because of inadvertent steering lockup in Nissan vehicles as long Nissan is held to be operating in compliance with U.S. regulated safety requirements.

2. The trial court erred in ruling that Plaintiff should have read the handbook which was printed for the vehicle he was driving at the time of the accident.

3. The trial court did not permit Plaintiff's action to be set for trial until near the end of the statutory five-year time for bringing an action to trial in California. And although Plaintiff was appearing in pro per at the time the trial date was set and only obtained counsel thirty (30) days before trial on March 9, 1987, Plaintiff was unwilling to, and instructed his new counsel specifically *not* to, seek a continuance of the trial date. However, had Plaintiff known that the crucial elements of his expert witness's testimony would be barred from trial by the court, he indeed would have sought a continuance thereof.

4. Plaintiff submits further that in order to facilitate the possibility that a reversal of judgment herein will ensue from this appeal, Plaintiff vacates his demand for damages in this action previously sought in the amount of $10,000,000.

I.

IN THE INTEREST OF PUBLIC SAFETY, PLAINTIFF SEEKS DESPERATELY TO MAKE THE PUBLIC AWARE THAT DEFENDANT NISSAN ALTERED ITS STEERING LOCK DESIGN IN 1987 AS A *REMEDIAL* ACTION.

Plaintiff submits that the thrust of his effort by this appeal is to bring to the attention of the public the fact that Defendant Nissan has manufactured automobiles for the least 17 years which are equipped with a steering

wheel lock that is defective. The defect is in the design of the lock in that, although intended to act as a theft deterrent, it also causes the steering column to lock while the vehicle is being driven if the ignition key is turned off for any reason. In 1987, Nissan changed the design of the steering lock to add a safety device (in use on all American cars). This safety device allows the driver of the vehicle to deactivate the car's engine in emergency situations and at the same time prohibits steering column lockup. Most drivers are unaware that Nissan-Datsun steering can lock while the vehicle is in motion. Consequently, they are ill-prepared to anticipate such a lockup, and many people have been and continue to be, killed or or seriously injured from vehicluar collisions which result when a lockup occurs.

The National Highway Traffic Safety Administration (hereinafter "NHTSA") is aware that inadvertent steering column lockup occurs on a regular basis in the United States. A recent volume of the *Federal Register* (Vol. 53 No. 65/Tuesday, April 5, 1988) includes an article which makes direct reference to such awareness on the part of NHTSA:

> "NHTSA continues to receive complaints of accidents, property damage, personal injury, and fatalities and apparently result from drivers of manual and automatic vehicles inadvertently locking their steering columns while driving."

Yet, despite such evidence, the NHTSA has failed and refused, and continues to fail and refuse, to initiate such actions that will eliminate inadvertent lockup as a public menace.

It has been held by courts in the past that a matter involving the public interest is a proper ground for appeal. In *Bayside Timber Co. v. Board of Supervisors* (1971) 20 C.A. 3d 1, 4, 5, 97 C.R. 431, the trial court rendered judgment granting permits to the timber company to log, pursuant to the regulations of the State Board of Forestry. The defendant county appealed and for the first time raised the issue of unconstitutionality of the Forest Practice Act. The appellate court, treating this as the main issue on appeal, held the statute invalid. Similarly, in *Wong v. Di Grazia* (1963) 60 C.2d 525, 532, 35 C.R. 241, 386 P.2d 817, in a case involving the issue of perpetuities, court ruled that the issue involved considerable public interest and opted to dispose of the issue on its merits. In *United Calif. Bank v. Bottler* (1971) 16 C.A.3d 610, 616, 94 C.R. 227, also involving the issue of perpetuities, the court ruled that this issue is "based upon public policy rather than private convenience" and therefore was properly raised for the first time in appellant court.

In yet another case, *Hale v. Morgan* (1978) 22 C.3d 388, 394, 149 C.R. 375, 584 P.2d 512, the reviewing court held that the issue was a constitutional one, and of great *public interest*.

In the instant case, Defendant Nissan's position with the trial court was that the design change it made on its vehicles in 1987 did not involve a *remedy* for an existing (and fatal) problem, but, rather, changed "for a weight-saving device" (R.T. p. 54, l. 14-15).

With Nissan's continued refusal to alert the motoring public about inadvertent lockup, Plaintiff contends that based on *remedial* design change, the American de facto

safety standard, and the federal law FMVSS 114-S.4.2, Nissan is acting with reckless disregard for the safety of the public.

Plaintiff's concern for the public interest with regard to this case is *not* a grandstand position to win this appeal. Since the subject accident occurred, Plaintiff has actively pursued all avenues within his grasp to bring the subject of inadvertent steering wheel lockup to the attention of the public. Among other efforts, Plaintiff has collaborated with Richard Katz, Chairman of the California Assembly Transportation Committee for the purpose of amending the California Drivers Handbook to include a specific warning to drivers of the possibility of inadvertent steering column lockup. Through Plaintiff's perseverance, the latest publication of said Handbook, due to be available to the general public by the middle of December, 1988, will include such warning within its beginning pages. A copy of the correspondence to Plaintiff from Assemblyman Katz confirming such revision, dated June 1, 1988, is attached hereto as Exhibit "B" and made a part hereof.

Additionally, Plaintiff's efforts so described have not gone unnoticed by the local media. The *Daily News*, a newspaper based in the San Fernando Valley in California, where Plaintiff resides, published an article in its Sunday, July 17, 1988 edition wherein Plaintiff and a collaborator discussed the need for state and federal government involvement in the issue of inadvertent steering wheel lockup. The article goes on to confirm that a revision of the California Drivers Handbook has been approved through the *direct* efforts of Plaintiff and others.

A copy of the *Daily News* article is attached hereto as Exhibit "C" and made a part hereof.

Finally, Plaintiff's concern for public safety with regard to the specific hazard of inadvertent steering lockup had prompted him to form with others a non-profit organization created specifically for that purpose, known as Automobile Safety Foundation headquartered in Encino, California. The Foundation's initial brochure, which has been circulated widely (a copy of which is attached hereto as Exhibit "D") emphasizes the main facts and goals on which the Foundation is based, and which are also the foremost concerns of Plaintiff in this appeal.

Based upon all of the above, Plaintiff maintains that the American public will continue to be killed and suffer horrendous injuries and will continue to be exposed to extreme endangerment as long as Nissan is held to be in compliance with U.S. regulated safety requirements for their vehicles.

Plaintiff therefore submits that the general welfare of the public at large is, by this appeal, in the hands of the judges of the appellate court of this state. You, Your Honors, have the power to alleviate the problem of unnecessary deaths and injuries by overlooking the insistence of Defendant Nissan that they have altered their steering column lock design for other than *remedial* purposes. That end can only be achieved by a reversal of the judgment which has been rendered herein.

II.

THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF SHOULD HAVE READ THE HANDBOOK WHICH WAS PRINTED FOR THE VEHICLE HE WAS DRIVING AT THE TIME OF THE ACCIDENT.

The trial court herein ruled that it was incumbent upon Plaintiff to have actually read the vehicle handbook applicable to the vehicle he was driving at the time of the accident (R.T. p. 1890, l. 11-26.)

Plaintiff contends that the warning contained in the handbook is inadequate because it is not visible. Furthermore, it is inadequate for the following reasons:

1. It is not required reading.

2. It is not the established policy of the general public upon renting or borrowing a car tc read the drivers handbook.

3. There is no guarantee that a drivers handbook may or may not be available to a driver within the vehicle.

4. Drivers handbooks are frequently misplaced as a vehicle becomes older or the owners change.

Finally, because of the fact that the handbook warning is entirely insufficient, the California Department of Motor Vehicles has seen fit to alert and warn drivers about inadvertent lockup in the new driver handbook (discussed in part I hereof).

III

THE TRIAL COURT DID NOT PERMIT PLAINTIFF'S ACTION TO BE SET FOR TRIAL UNTIL NEAR THE END OF THE STATUTORY FIVE-YEAR TIME FOR BRINGING AN ACTION TO TRIAL IN CALIFORNIA.

Trial case was filed in November, 1982, but was not set for trial until the time for trial had nearly expired. The date of trial was March 9, 1987. Therefore, Plaintiff was very anxious that the trial proceed without any continuances. He instructed his attorney, who was retained on February 9, 1987, that even though only 30 days remained before trial, there were to be no continuances thereof. (R.T. p. 6, l.6-12.) Plaintiff feared that if he had abandoned the trial date as set, another date might not be available before the end of the five-year statute. It was not until the actual day of trial that Plaintiff became aware that the testimony of his expert witness, Mr. Schmidt, relating to inadvertent steering column lockup, would be barred as evidence because it was opposing counsel's contention that the witness had not discussed that subject at deposition and in his reports. Since it was Defendant Nissan which had deposed Mr. Schmidt, Plaintiff *would* have sought a continuance of the trial to depose Mr. Schmidt further had he been aware of the necessity to do so.

Plaintiff contends that his failure to secure adequate and relevant testimony from his witness is due entirely to his having been denied a *speedy* trial by the lower court.

Furthermore, Plaintiff's counsel, Mr. Davidson, had been given a document addressed by the Court Administrator which indicated that no discovery would be permitted within the last 30 days of trial (R.T. p. 525). Mr. Davidson also understood and was led to believe by court personnel that since his expert had not completed

his work, his deposition could be continued, if necessary, *during trial.* (R.T. p. 345-346.)

IV

PLAINTIFF SUBMITS FURTHER THAT IN ORDER TO FACILITATE THE POSSIBILITY THAT A REVERSAL OF JUDGMENT HEREIN WILL ENSUE FROM THIS APPEAL, PLAINTIFF VACATES HIS DEMAND FOR DAMAGES PREVIOUSLY SOUGHT IN THE AMOUNT OF $10,000,000.

Plaintiff has sought damages in his Complaint of $10,000,000 in addition to damages for specific injuries. At this time, however, for the sake of public safety, Plaintiff is willing to modify his claims for monetary damages as follows:

1. Plaintiff abandons his request for punitive damages of $10,000,000.

2. As and for Plaintiff's incurred medical and legal expenses, in the actual amounts therefor.

3. Plaintiff requests only such other and further relief as the appellate court might deem just and proper.

CONCLUSION

In order to spare the lives of innocent men, women and children, Plaintiff prays this honorable court for a reversal of the judgment herein.

/s/ Wilson Robert Sherman
WILSON ROBERT SHERMAN
Appellant In Pro Per

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age and not a party to this action. I am employed at 6223 Selma Avenue, Los Angeles, CA 90028.

On November 28, 1988, I caused to be served the attached APPELLANT'S OPENING BRIEF by causing true and correct copies of same to be placed in the United States Mail at Los Angeles, California in sealed envelopes with postage prepaid, addressed as follows:

DONALD D. HOWARD, ESQ.
VINCENT GALVIN, ESQ.
McCutchen, Doyle, Brown &
Emerson
Market/Post Tower, Suite 1500
55 South Market Street
San Jose, CA 95113

HONORABLE JOHN G. SCHWARTZ
Judge of the Superior Court
County of San Mateo
401 Marshall Street
Redwood City, CA 94063

SUPREME COURT OF THE STATE OF CALIFORNIA
4250 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California on May 4, 1988.

/s/ Tannie L. Braziel
Tannie L. Braziel

APPENDIX L

SUPREME COURT

STATE OF CALIFORNIA

WILSON ROBERT SHERMAN, Plaintiff-Appellant, vs. NISSAN MOTOR CORPORATION IN U.S.A., et al., Defendants-Respondents.	No. A038665 San Mateo NO.: 269509

PETITION FOR REVIEW

WILSON ROBERT SHERMAN
5460 White Oak, C336
Encino, CA 91316
(818) 501-2948
Plaintiff-Appellant
In Pro Per

SUPREME COURT

STATE OF CALIFORNIA

WILSON ROBERT SHERMAN, Plaintiff-Appellant, vs. NISSAN MOTOR CORPORATION IN U.S.A., et al., Defendants-Respondents.	No. A038665 San Mateo NO.: 269509 PETITION FOR REVIEW

On February 8, 1989 the Court of Appeal of the State of California, First Appellate District Division Three, dismissed WILSON SHERMAN'S appeal based on (here say) on the premise it "failed to comply in any significant

respect with the rules of court and the case law requirements." However, the court does not cite specifically one error.

Appellant thinks the court had an exaggerated concern for form (ality) and little (if any) for content. The content, not considered, is most valid, and in the highest concern for public interest along with solid legal grounds for the appeal.

The State of California, the California Department of Motor Vehicles, recently proved, what appellant, WILSON SHERMAN, has been trying to prove in Court for seven years, that defendant NISSAN CORPORATION has a lethal defect in their steering lock mechanism that permits "inadvertent lock-up" (see enclosed Exhibit 1), by WARNING about it in their new driver handbook (see enclosed Exhibit 2) in as effort to spare the lives of innocent men, woman, and children. Nissan attempted to correct this defect in 1987, but refuses to acknowledge public endangerment caused by approximately 20 years of their vehicle with the defect. Nissan is aware that their are 49 other states that have not been warned and so far they have refused to do so.

Canon 2 of Canons of Judicial Ethics declares "COURTS EXIST TO PROMOTE JUSTICE, AND THUS TO SERVE THE PUBLIC INTEREST."

Appellant maintains that public safety is a paramount public interest issue, that NISSAN CORPORATION'S defect posses a State and National Emergency and the appellate Court erred in their failure not to follow conduct of Canon's of Judicial Ethics, and act on behalf of public interest (safety).

On the basis of public interest, in order to spare lives and on the Canons Judicial Ethic, appellant prays this court for a reversal of the judgment.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Patricia A. Byard, am a resident of/employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; by business/resident address is: 14402 Haynes St., Suite 102, Van Nuys, CA 91401

On March 13, 1989. I served the foregoing (set forth the exact title of the document served) PETITION FOR REVIEW on the Interested Parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

See attached mailing list.

(check applicable paragraphs)

[X] (BY MAIL) I caused such envelope with postage thereon fully paid to be placed in the United States mail at Los Angeles, California.

[ ] (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

[X] (State) I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[ ] (Federal I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on
March 13, 1989

Signature of Declarant
Patricia A. Byard

MAILING LIST

Donald D. Howard, Esq.
Vincent Galvin, Esq.
McCutchen, Doyle, Brown & Emerson
Market/Post Tower, Suite 1500
55 South Market Street
San Jose, CA 95113

Honorable John G. Schwartz
Judge of the Superior Court
County of San Mateo
401 Marshall Street
Redwood City, CA 94063

Court of Appeal
350 McCallister St.
Room 5154
San Francisco, CA 94102

(3)

CASE NO. 89 - 342

Supreme Court, U.S.
FILED
OCT 26 1990
JOSEPH F. ...
CLERK

in the

SUPREME COURT

of the

UNITED STATES

October Term, 1989

WILSON ROBERT SHERMAN,

Petitioner,

vs.

NISSAN MOTOR CORPORATION IN U.S.A.
and NISSAN MOTOR CO., LTD.

Respondent.

REBUTTAL TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT WILSON SHERMAN
5460 White Oak, F309
Encino, CA 91316
(818) 501-2948
Petitioner, In Pro Per

11pp

QUESTIONS PRESENTED

Where there is an immediate and tragic danger to those individuals that operate automobiles equipped with a defective steering lock system that can prevent the steering wheel from being turned while the automobile is moving, there is definite cause for consideration by the United States Supreme Court to bring about a decision that would eliminate this hazard and thus protect the public from such hazard.

1. Does "Special and important reasons", within the rule relating to granting of certiorari, relate to problems beyond the academic or episodic, especially where issues have an adverse effect and impact on the health, safety, and welfare of the people in our nation?

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CASE NO. 89-342

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

WILSON ROBERT SHERMAN

Petitioner,

REBUTTAL TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court faces the problem of jurisdiction to consider this Petition For Writ of Certiorari. Rule 17.1 of the Rules of the Supreme Court of the United States provides that a Writ of Certiorari, "will be granted only when there are special and important reasons therefor." Rule 17.1 further states that considerations for such a rule "...neither controlling nor fully

measuring the Court's discretion, indicate the character of reasons that will be considered. Public safety is a paramount special and important reason.

FACTS RELATING TO ARGUMENT

On 25 November 1981 Wilson Robert Sherman (Sherman) was driving a borrowed Datsun 280Z with his fiance, Julie Lynn Riess, as his passenger. The Car struck a Eucalyptus tree on the North side of New Place Road in Hillsbourgh, Califonria. Miss Riess was killed on impact. Sherman was hospitalized with extreme injuries.

Sherman was placed under arrest at 1:10 a.m. on 25 November 1981 at Peninsula Hospital for Manslaughter (California Penal Code SS 192.3). This was forty-five (45) minutes after the estimated accident time of 12:25 a.m. Sherman should not have been cited until a complete and thorough investigation by the Hillsborough Police Department (HPD). These charges were based

on speculation by the officers that Sherman was speeding and drunk-driving due to their detection of a "slight scent of alcohol" on his breath.

The HPD police report stated that the ignition key was missing from the automobile right after the accident.

An alcohol blood test was given without Sherman's knowledge, at the accident sight which resulted in a .09 alcohol level reading. In 1981, .09 was below the legal limit, therefore, Sherman could not be prosecuted for drunk driving.

An investigation by the California Highway Patrol of the Accident was requested as a cursory study. It was determined that the speed of the car before the lockup was 33 mph. Thus disproving the HPD's speculation of speeding. The M.A.I.T. Team of the CHP, was confined by the HPD to a "limited report" thusly not

allowing them to follow up suspicions of mechanical malfunction.

All testimony regarding the mysteriously missing ignition key was refused to be submitted by the Court at the trial.

The burglar alarm, which was located in the glove box of the automobile also mysteriously disappeared while the automobile was in complete control of the HPD. The burglar alarm was hypothesized as one reason for inadvertent lock-up.

Sherman was in a semi-conscious state for five (5) days after the accident. He had suffered extensive injuries, including a broken shoulder, a sprained neck, a punctured lung and a severe concussion. Contrary to the testimony of Dr. Levin and Dr. Gallo, Sherman did, in fact, receive an extreme blow to his upper right forehead, rendering him unconscious. One of these doctors did, in fact, even stitch the

wound. Mr. Sherman has many witnesses that can testify he was unconscious for several days. He has no memory of the accident.

There was a Hillsborough City Council meeting that focused on HPD police chief's negligence while handling the matters in connection with Sherman's accident. There are an array of false and misleading facts and conduct that are in conjunction with this entire case.

ARGUMENT

No law suit was ever filed by Mr. Reiss against Mr. Sherman, but on the contrary, Mr. Riess joined forces with Sherman against Nissan. Mr. Riess settled with Respondent and is no longer involved in this action.

On 20 October 1989 the Superior Court of California, County of Los Angeles, case number 048971, under Judge Richard Adler, found Robert Swanson, the attorney repre-

senting Sherman during the appellate phase of this case responsible for misrepresentation and malpractice, thusly, awarding Sherman the return of all fees and applied interest. This decision shows a major contributing cause to the faulty procedural aspects that were incurred at the appellate level of this case and should be considered by this Court in reference to the "special and important reasons" as outlined in rule 17.1 of the Rules of the Supreme Court of the United States.

Contrary to statements in Respondent's brief, Dave Schmidt theorized steering lock-up to be the cause of the accident from his initial inspections and tests back in 1982. Over the years, Mr. Schmidt has stengthened his findings in the matter.

As far as Respondent's expert witnesses' testimony they were simply paid to express Nissan's opinion.

Finally, Respondent claimed that Mr. Sherman had a "vendetta" against Nissan, and had even stated it publically. This is unfounded and untrue. Quite the contrary, Mr. Sherman has spent approximately 8 years in an humanitarian effort to rectify this defect.

Respondent's strategy has been to cloud and confuse the issue of their lethal defect with unrelated insignificant and spurious asides.

CONCLUSION

The focus of this case in reference to a defective anti-lock mechanism and the impact this has on public and national safety are established and indisputable. The breach of public safety in regards to this matter is definitely of constitutional proportions and should be compelling enough as a special and important reason for the Court to grant review of this Writ

of Certiorari.

Furthermore, due to the NATIONAL EMERGENCY caused by this lethal defect, we request that the Court will rule that Respondent, Nissan, must engage in a vast public awareness campaign to alert and warn the nation about the extreme hazard of inadvertent lock-up, immediately.

For the purpose of sparing lives of many innocent people we pray that the United States Supreme Court will enact this verdict forthwith.